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Supreme Court of the United States

OCTOBER TERM, 1902.

No. 158

THE NATIONAL MUTUAL BUILDING AND LOAN ASSOCIATION OF NEW YORK,

Plaintiff-in-Error,

vs.

FRANK V. BRAHAN,

Defendant-in-Error.

IN ERROR TO THE SUPREME COURT OF MISSISSIPPI.

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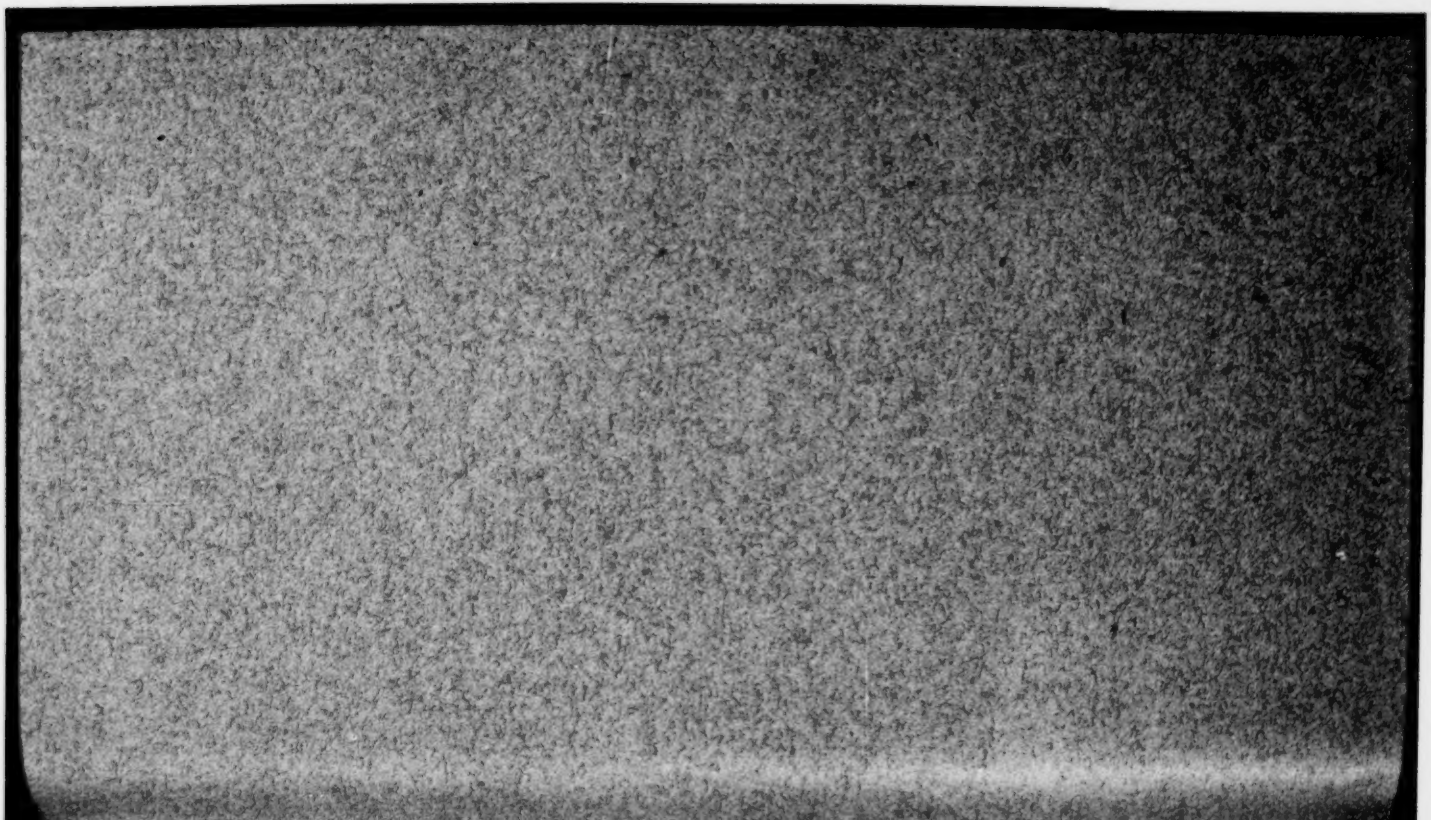
No. 18,732.



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(18,733.)

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 505.

THE NATIONAL MUTUAL BUILDING AND LOAN ASSOCIATION OF NEW YORK,
Plaintiff in Error,

versus

FRANK V. BRAHAN,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF MISSISSIPPI.

Statement of Case.

This writ of error presents for review a final judgment of the Supreme Court of Mississippi, which affirmed a judgment of the Circuit Court of Lauderdale County in favor of defendant in error against plaintiff in error. Frank V. Brahan instituted an action at law in the Circuit Court of Lauderdale County, Mississippi, against the National Mutual Building and Loan Association of New York, to recover the sum of $2,223.41, which Brahan alleged he had paid to said Association in

excess of the principal of two several loans or advances made to him by said association, which loans were alleged to be usurious, under the statute of the State of Mississippi, authorizing the recovery of all interest paid on any contract requiring the payment of a greater rate of interest than ten per cent. per annum (Transcript, pp. 1–5).

The contracts in question were made by and between said Frank V. Brahan and the National Mutual Building and Loan Association of New York, under the circumstances and in the manner hereinafter stated:

Frank V. Brahan was, and is, an attorney-at-law, and a resident and citizen of Lauderdale County, Mississippi, and was over twenty-one years of age when he applied to become a member of said association (Transcript, pp. 67–68).

The National Mutual Building and Loan Association of New York is a mutual building and loan association incorporated under Chapter 123 of the Laws of the State of New York, passed April 10, 1851, entitled "An Act for the incorporation of building, mutual loan and accumulating fund associations," and the Acts amendatory thereof, to-wit: Chapter 564 of the Laws of New York, passed June 9, 1875, and Chapter 96 of the Laws of New York, passed April 1, 1878; and was organized for the purpose of carrying on the business of a building and loan association in the City and State of New York; and its domicile and principal place of business is, and always has been, in the City of New York (Transcript, p. 38).

The Association at first made loans in the State of New York only, but afterwards extended its operations and made loans to its shareholders in other States, including the State of Mississippi (Transcript, pp. 42–53).

The Association was authorized to, and did in fact, lend money to its shareholders only (Transcript, pp. 62–65).

The Association did not have any branch offices in the State of Mississippi for the purpose of lending money; and never had any such office anywhere except its principal office in the State of New York; but did have an agent in Meridian, Mississippi, who had authority to receive and forward to the office of the Association of New York applications for shares and applications for loans, and to receive and receipt for dues on shares and interest and premiums on loans; but such agent did not, at any time, have power or authority to make or grant loans for the Association (Transcript, p. 38).

Under the articles of Association, the executive committee of the Association, consisting of the first vice-president, the secretary and general attorney, alone had authority to pass upon applications for loans, and all loans that have ever been granted by the Association have been granted by such committee (Transcript, p. 38).

The plan upon which all loans are granted by the Association, including the loans to Brahan, is as follows:

Loans are made only to members of the Association.

A borrowing member is required to own and pledge one share of stock in the Association of the maturity value of $100.00 for each $100.00 borrowed. by him, and to pay the dues on each share at sixty cents per month, and to pay interest at the rate of six per cent. per annum on each $100.00 borrowed, until the shares mature, that is, until the shares are worth $100.00 each. He is also required to pay a monthly premium of fifty cents on each

$100.00 borrowed for not over eight years from the date of the loan, even though it takes longer than eight years to mature the shares; 5/6 of the amount paid for dues on shares is credited directly on those shares; and the fund so formed, with profits credited thereto, eventually works the maturity of the shares. The other 1/6 of the dues is appropriated to the expense fund of the Association.

The profits are made up of the interest and premium paid by all borrowers, the fines paid, and the difference between the withdrawal value and the holding value, or book value, of the shares when withdrawn before maturity; the withdrawal value being always less than the holding or book value. All profits, from whatever source, go into one common fund, and are apportioned quarterly to all shares in force according to their capital value. For example, a share worth $10.00 receives 1/2 as much of the profits on an appointment, as a share that is worth $20.00.

The loan fund is made up of 5/6 of the dues, as aforesaid, and all profits of the Association, and from this fund loans are made to the members on the terms aforesaid.

No payments of dues, interest, or premium, made by borrowing members are credited on the principal of the loan; but all such payments go to mature the shares; and when the shares become worth $100.00 each, their value is then applied under the contract, in re-payment of the principal sum borrowed, upon their being surrendered to the Association; the maturity value of each share, to-wit: $100.00 thus repaying $100.00 on the principal sum borrowed.

The application of the value of the shares to the re-payment of the loan is always made at the office of the Association in the City of New York.

Loans are of two kinds: 1st, Loans upon shares, and 2d, Loans upon shares and real estate.

All applications for loans must be made, and are made, upon blanks provided for that purpose.

All such applications are, and have been, considered and passed upon by the executive committee of the Association at the office of the Association in New York.

In case of a loan on shares and real estate, the indebtedness and the agreement to repay the advance is evidenced by a bond, and is secured by an assignment of the shares as collateral and a mortgage on real estate.

All papers securing loans are drawn at the office of the Association in New York, and if the borrowing member does not reside in New York, the papers are sent by the secretary of the Association to a local attorney at the place of his residence, with checks on the Mercantile Trust Company of New York for the amount of the loan, with instructions to deliver the checks to the borrower on the proper execution of the papers, and on his being able to give an unencumbered title to the property. (Transcript, pp. 51–52.)

It is provided in all the bonds and mortgages executed by borrowers that all payments are to be made to the Association at its office in the City of New York. (Transcript, p. 53.)

Brahan was permitted to make payments of dues, interest and premium to the special agent of the Association at Meridian, Mississippi, for his own convenience, but there was no requirement or contract that he should do so; the only contract in regard to the place of payment being that embodied in the Bond, assignment and mortgage. (Transcript p. 41.)

ARTICLES OF ASSOCIATION.

The Articles of Association, material to be considered in this case, are the following:

ARTICLE 1.

Name, Location, and Objects.

Section 1. The name of this corporation is the "National Mutual Building and Loan Association of New York."

Section 2. The principal office of the Association shall be in the City of New York.

Section 3. The objects for which the Association has been formed are:

The accumulation of a fund for the purchase of real estate, the erection of buildings, the establishment of homes, making improvements on lands and paying off incumbrances thereon, aiding its members in acquiring real estate, making improvements thereon and removing encumbrances therefrom, and for the further purpose of accumulating a fund to be returned to its members who do not obtain advances on their shares, when the funds of the Association, to the credit of each share, shall amount to one hundred dollars, the full value of a share. And for the transaction of the general business of a building, mutual loan and accumulating fund association."

ARTICLE 3.

Meetings, Votes.

"Section 1. The first regular meeting shall be held within thirty days after the incorporation of the association, for the election of officers of the association; and thereafter on the third Wednesday of April in each year, a general meeting of the association, for the election of directors, shall

be held in the City of New York, at such hour and place as the directors may designate."

"The secretary shall at least twenty days before the time of such meeting, cause notice thereof to be deposited in the post-office in New York City, directed to the address of each member, as the same appears on the books of the association."

"Section 4. Each member of the association not in arrears shall be entitled to one vote, and but one vote, at all general and stated meetings."

ARTICLE 6.

Executive Committee.

"There shall be a standing committee to be known as the executive committee, which shall consist of the first vice-president, the general attorney and the secretary. The executive committee shall examine all applications for loans, judge of the sufficiency of the securities offered, audit and pass upon all claims against the association, and have full charge and supervision of the business of the association between the meetings of the board of directors."

ARTICLE 8.

Shares.

"Section 1. The capital of the association, to be accumulated, shall be fifty million dollars, divided into shares of the maturity value of $100.00 each, and shall be known as instalment shares, paid-up shares and interest-bearing paid-up shares."

"Section 2. Instalment Shares.—Instalment shares shall be issued in monthly series, and shall be dated the first business day of the month, and shall be due and become payable whenever the amount in the loan fund to the credit of such shares, consisting of monthly dues and profits apportioned to such shares, shall equal the face value of the shares."

ARTICLE 10.

Dues.

"The monthly dues on each instalment share shall be sixty cents per month, and must be paid on or before the last business day of each month until the maturity of the shares."

ARTICLE 12.

Loans.

"Section 1. The loan fund of the association shall consist of fifty cents of the monthly dues paid in on each share, interest, premiums, fines, and forfeitures, and the profits derived therefrom, and shall be loaned to members of the association by the board of directors upon approved application for loans in the order in which they have been filed."

"Section 2. Interest at the rate of not more than six per cent. per annum will be charged upon all loans, which interest must be paid monthly, with the monthly dues, on or before the last business day of each month until the maturity of the pledged shares, and a premium of not more than fifty cents per month will be charged on each one hundred dollars borrowed, which premium must be paid on or before the last business day of each month, for a period of eight years, or until the maturity of the pledged shares, should they mature before the expiration of the eight years. The premium for the first six months to be paid in advance."

ARTICLE 13.

Loans on Shares.

"Any member can borrow on his shares ninety per cent. of the withdrawal value thereof, upon executing and delivering to the association such

note, bond or other instrument as the board of directors may require, together with an assignment of the shares as security. Interest and premiums on such loans will be the same as in the case of a loan on real estate security, and the loan may be repaid in the same manner and on the same terms, but no redemption fee will be charged on such loans" (Transcript, pp. 27–34).

THE CONTRACTS IN QUESTION.

First Loan.

In April, 1892, the defendant-in-error, Frank V. Brahan, then a resident of Meridian, Mississippi, desiring to borrow $2,500.00 from the National Mutual Building and Loan Association of New York on certain lands owned by him in Meridian, Mississippi, and being advised that said association made loans, or advances, to its members only, made written application for membership in the association, and subscribed for twenty-five shares of stock in the association, agreeing in said application to abide by all the terms and conditions contained in the articles of Association (Transcript, pp. 19–67).

And at the same time the said Brahan made a written application to the Association at New York for a loan of $2,500.00 on his twenty-five shares in said Association, on the terms, and under the rules and regulations of the Association (Transcript, pp. 19–68).

These applications for membership and for a loan were given by Brahan to the local agent of the Association at Merdian, Mississippi, and they were forwarded by this agent to the Association in the City of New York; and, *after due consideration at New York* by the executive committee of the Association, the application was there granted by said committee (Transcript, p. 40.)

The agents at Meridian, Mississippi, had nothing to do with the granting of the loan; but their entire connection with the matter ended when they forwarded the application to the Association (Transcript, p. 40.)

Thereupon, the said twenty-five shares of stock having been issued to Brahan in pursuance of his application and subscription, and said loan having been granted, Brahan executed to the Association, on May 21, 1902, his bond, assignment of stock and mortgage on certain real estate situated in Mississippi, whereby he agreed to repay said Association the said sum of $2,500.00 at its office in New York City, with interest on the same at the rate of six per cent. per annum until paid, together with a monthly premium of $12.50 for eight years, or until the earlier maturity of said shares should they mature before the expiration of eight years, and in addition thereto the sum of $15.00 for the monthly dues on the said twenty-five shares; which interest, premium and dues were *agreed to be paid* monthly *at the office of the Association in New York* (Transcript, pp. 72–77).

Upon the execution of these papers, checks of the Association on the Mercantile Trust Company of New York for the amount of the advance, were delivered to Brahan. These checks were indorsed by Brahan, and after such indorsements, were paid by said Mercantile Trust Company *at the City of New York* (Transcript, p. 42.)

Brahan paid on account of this loan $66.25 by way of advance premium. He also paid through the agent of the Association at Meridian, Mississippi, the sum of $668.75, interest, premium and dues; and on November 7, 1893, desiring to pay the loan in full without the surrender of his stock, Brahan paid the Association direct the sum of $2,500.00

in full payment of his loan, retaining his twenty-five shares of stock as an investment (Transcript, pp. 19–78).

This payment was made by Brahan's sending to the Association at New York a draft for $2,500.00, drawn by J. C. Lloyd & Company on the Hanover Fire Insurance Company of New York; and the draft was paid to the Association at New York. by the Insurance Company, the drawee. (Transcript, p. 50.)

Brahan carried his twenty-five shares of stock in the Association from this date until October 1894, as an investment, and paid thereon during this time dues aggregating $135.00.

In October, 1894, Brahan withdrew five of these shares under the provisions of the Articles of the Association, and received therefor in cash the sum of $73.90, their withdrawal value, which was made up in part of the profits that had been apportioned thereto (Transcript, pp. 20–45)

Second Loan.

On June 6, 1894, Brahan made a second application in writing to the Association in New York for a loan of $2,000.00 on his twenty shares of stock. This application went through the same routine as the first application. It was filled out by Brahan at Meridian, Mississippi, on a printed form furnished by the Association for that purpose, and was delivered by Brahan to the agent of the Association at Meridian, and was forwarded by this agent to the Association at New York for consideration. The application was considered by the executive committee of the Association in New York City, and *was there granted* by the executive committee, and, in pursuance thereof, Brahan executed to the Association his bond, assignment of shares and mortgage of date August 30, 1894, which were in the same

form and to the same effect as the former bond, assignment of shares and mortgage executed by him on May 21, 1892 (Transcript, pp. 20–26, 70–71, 39–40).

Upon the execution of these papers, checks for the amount of the advance drawn by the Association on the Mercantile Trust Company of New York, were delivered to Brahan, and, after being indorsed by him, were paid by the Trust Company at New York (Transcript, p. 42).

This bond and mortgage provided that Brahan should repay the $2,000.00 to the Association *at its office in New York City*, and that the monthly payments of dues, interest and premium were payable *at the office of the Association in New York City* (Transcript, pp. 20–26).

Brahan paid on this second loan, and on his stock, dues, interest, premium and fines to the amount of $868.00, which was paid by him to the special agent of the association at Meridian, Mississippi, and these payments were forwarded by said agent to the Association at New York (Transcript, p. 20).

In March, 1897, Brahan desired to surrender his shares and to pay his loan in full; and he accordingly withdrew his shares before maturity under the terms of the Articles of Association, and procured their withdrawal value, $649.70, to be applied by the Association *at New York* as a part payment on the loan. This left a balance due of $1,473.96, and Brahan paid this to the Association by sending *to the Association at New York* a draft on New York for that amount, $1,473.96 in March, 1897 (Transcript, pp. 20–50).

It will thus be seen that the greater portion of both these loans, to wit: the sum of $2,500.00 on the first loan, and the sum of $1,473.96 on the second loan, were repaid by Brahan to the Association *at its office in New York* in strict compliance

with the provisions of the bonds, assignments and mortgages in this regard (Transcript, p. 56).

The payments of dues, interests and premiums, made by Brahan to the special agent of the Association at Meridian, Mississippi, were so made by Brahan for his own convenience by permission of the Association—a permission which was revocable at pleasure—and there was never any contract authorizing or requiring Brahan to make payments to an agent of the Association at Meridian; nor was there any agreement, or understanding between Brahan and the Association, that the Association should maintain an agent at Meridian, to whom payments might be made (Transcript, p. 41).

The provisions in the bonds and mortgages that all payments were to be made to the Association at its office in New York, were not inserted in these instruments for the purpose or with the intent to evade the usury laws of the State of Mississippi; but were incorporated in the forms of these instruments first used by the association when it was making loans in the State of New York only; and when the association extended its operations to other States, the same forms were used as in New York, because it was considered both prudent and expedient that all payments should be made to the association at its office in New York, and in order that its contracts should have a uniform interpretation (Transcript, pp. 41-42).

Both of the loans in question were paid and settled by Brahan *voluntarily and of his own motion*, and he was not forced to pay them, or either of them, by the association; nor did Brahan make any objection to the settlement of said loans as made, or the amounts paid the association, for more than two years after the settlement of the last loan (Transcript, p. 56).

PLEADINGS, STATUTES OF MISSISSIPPI AND FEDERAL QUESTIONS.

The declaration was filed on July 7, 1899, during the July term of the Circuit Court, and alleged that the defendant association was a foreign corporation engaged in lending money in the State of Mississippi; that the loans and contracts in question were made in Mississippi, and to be performed in Mississippi by plaintiff Brahan making all his payments to the agent of the defendant association at Meridian; and that the provision in the contract requiring payments to be made to the association at its office in New York was written therein by the defendant with the intent fraudulently to evade the usury laws of the State of Mississippi; that both of said loans were usurious contracts and wilful violations of the statute of Mississippi against usury, and that he had paid the association $2.223.41 in excess of the principal of said loans, which he was authorized to recover under the statute of Mississippi, and for this sum he demanded judgment.

In this connection we call the Court's attention to the fact the declaration was signed by "F. V. Brahan, *per se*" (Transcript, pp. 1-4).

The Mississippi statute against usury in force when the first loan was made in May, 1892, was Chapter 13 of the Acts of 1886, which is as follows:

"AN ACT IN RELATION TO THE RATE OF INTEREST IN THIS STATE."

"Section 1. Be it enacted by the Legislature of the State of Mississippi. That hereafter no person, bank, corporation or association of persons, except building or loan associations, shall demand or stipulate for a greater rate of interest than ten

per cent., per annum, for any money advanced or loaned, or any note, account, or other evidence of debt."

"Section 2. Be it further enacted, That every provision of any Act heretofore passed, creating any corporation, or amending any act creating any corporation, which authorizes any such corporation to take or receive more than ten per centum interest per annum, or which is in conflict with Section 1141, of the Code of 1880, is hereby repealed."

"Section 3. Be it further enacted, That this Act takes effect and be in force from and after its passage."

"Approved, March 13, 1886."

The statute in force when the second loan was made in August, 1894, was Section 2348 of the Annotated Code of 1892, which is as follows:

"Legal Rate. The legal rate of interest on all notes, accounts, and contracts shall be six per centum per annum; but contracts may be made, in writing, for the payment of a rate of interest as great as ten per centum per annum. And if a greater rate of interest than ten per centum shall be stipulated for or received in any case, all interest shall be forfeited, and may be recovered back, whether the contract be executed or executory; but this section shall not apply to a building and loan association domiciled in this State, dealing only with its members."

In September, 1899, and prior to the next term of the Circuit Court after the July term, 1899, the defendant filed its pleas to the declaration, consisting of the general issue, with notice thereunder that the defendant would give in evidence and prove, among other things, that the defendant was a Building and Loan Association, incorporated

under the laws of the State of New York and domiciled in the City of New York, where all its business was transacted, and all moneys due it were payable; that by the terms of the contract executed by plaintiff, all payments to be made on said loans, and for interest, premium and dues, were to be made in the City of New York; that under the contract and the Articles of Association, the loans were to be re-paid at the City of New York by the application at that City of a fund there accumulated, and there applied at maturity of the shares, and on surrender of same, in re-payment of the loan; that the applications for both loans were made to the defendant in the City of New York; that said applications were passed on and granted in the City of New York by the executive committee of the Association, which committee had the sole and exclusive power to grant loans; that said loans were re-paid in fact at New York, as provided in the bonds and mortgages; that the defendant Association was organized and incorporated under Chapter 122 of the laws of New York of 1851, and the Acts amendatory thereof.

Afterwards, in April, 1901, no trial of said cause having been had, the defendant below, the National Mutual Building and Loan Association, filed a motion for leave to amend its notice under the general issue. The character of the amendment will more fully appear in the brief filed herewith (Transcript, p. 14).

And afterwards, in August, 1901, the defendant, the National Mutual Building and Loan Association, filed its other motion for leave to further amend its notice under the general issue; the character of this amendment will also more fully appear in the brief filed herewith (Transcript, pp. 16–17).

At the October term, 1901, the plaintiff filed a motion to strike out these amendments, because filed without leave of the Court, and because the time for pleading had expired, and because an attempt had already been made to remove the cause to the Federal Court (Transcript, p. 18).

The Court below heard the motions of the defendant for leave to file these amendments to its notice under general issue, and also the motion of plaintiff to strike them out, at the same time, and ordered that the plaintiff's motion to strike out be sustained and denied the defendant's motion for leave to amend without assigning any reason therefor. "To which action of the Court the defendant then and there excepted" (Transcript, p. 18).

Afterward, and at the same term, the case was tried, and at the trial, the defendant Association moved the Court to instruct the jury to find for the defendant, for the reasons shown in said motion, which was as follows:

"And defendant, by its attorney, moved the Court to also give to the jury peremptory instruction for defendant, as follows:

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The defendant moves the Court to instruct the jury to find for the defendant as per the instruction herewith shown the Court:

1. Because the evidence shows each of the contracts in question to be a contract between a building and loan association and a borrowing shareholder, who was entitled under his contract to share and did share in the profits of the associ

ation, and the contract is therefore valid and not usurious.

2. Because the evidence shows that each of the contracts was made and consummated in the State of New York and is performable in the State of New York, and is to be construed by the laws of the State of New York, and that under the laws of New York each contract is valid and not usurious.

3. Because the evidence shows that at the time of making each of said contracts the plaintiff, F. V. Brahan, was a resident and citizen of the State of Mississippi, and the defendant association was then a resident and citizen of the State of New York, and under the fourteenth amendment to the Constitution of the United States, the plaintiff had the right, as a citizen and resident of Mississippi, to become a member and shareholder in defendant association, and to procure a loan or advance upon his shares upon the terms and conditions of the articles of association, and particularly to make said contracts payable and performable in the State of New York; and the defendant association had the reciprocal right and was under obligation to make such loan or advances to the plaintiff upon the terms aforesaid, and had the right to have said contracts made payable and performable in the State of New York, and having done this, the defendant is entitled under said fourteenth amendment to have said contracts construed and their validity determined by the laws of said State of New York, where each of said contracts is performable; and under Section 1 of article 4 of the Constitution of the United States, the defendant is entitled to have this Court give full faith and credit, in determining the validity of said contracts, to the public acts, records and judicial proceedings of the State of New York, and particularly, Chapter

122 of the laws of said State passed April 10, 1851, entitled "An act for the incorporation of building, mutual loan and accumulating fund associations," and the several acts amending the same, to wit: Chapter 564 of the Laws of New York of 1875, and Chapter 96 of the Laws of New York of 1878; and the articles of association of the defendant, and the judicial decision in the case of Association vs. Read, 93 New York, 474, and the other decisions of said State of like tenor and effect, which hold that contracts, like the contracts in question, are valid and enforceable and not usurious under the laws of New York

4. Because said contracts are valid and not usurious under Chapter 13 of the Laws of Mississippi of 1886.

5. Because Section 2348 of the Annotated Code of Mississippi, sought to be applied in this case, in so far as each of said contracts is concerned, is a law both *ex post facto* and impairing the obligation of said contract, and in violation of Section 10 of Article 1 of the Constitution of the United States.

6 Because the decision of the Supreme Court of Mississippi in the case of Sokoloski vs. New South Building and Loan Association, 77 Mississippi, 155, and the decisions following that decision, all rendered long after the making of both of said contracts, in-so-far as they undertake to set up and define the public policy of the State of Mississippi in regard to foreign building and loan associations, and their contracts with their members, are tantamount to judicial legislation, and in violation of Section 10, Article 1 of the Constitution of the United States, in so far as both said contracts are concerned, being in effect the passage of a law both *ex post facto* and impairing the obligation of said contracts.

7. Because the evidence shows that both loans have been voluntarily repaid and settled by plaintiff with a full knowledge of all facts.

8. As to said last loan of August, 1894, because the evidence shows that prior to November 1, 1892, the plaintiff being then and there a citizen and resident of the State of Mississippi, became a shareholder in and member of defendant association, a corporation chartered under the laws of New York and domiciled in New York, whereby under the articles of association of the defendant, the said plaintiff became then and there entitled to demand and receive of defendant an advance or loan upon his said shares upon the terms and conditions set out in said articles of association, when he should request the same, and the defendant then and there before said November 1, 1892, became and was under obligation to make said loan or advance to plaintiff when demanded upon the terms and conditions as aforesaid; that the said loan of August 30, 1894, was made by defendant to plaintiff on the shares aforesaid in pursuance of said contract of membership made and entered into prior to November 1, 1892, and in pursuance of said contract of membership and said articles of association, said contract of plaintiff to re-pay said loan was made payable and performable in said State of New York; wherefore, Section 2348 of the Annotated Code of Mississippi does not govern said contract, and is as to said contract a law both *ex post facto* and impairing the obligation of said contract and in violation of Section 10, Article 1 of the Constitution of the United States; and under Section 1 Article 4 of said Constitution and the laws of New York and the fourteenth amendment to said Constitution, the said contract of August

30, 1894, is valid and enforceable and not usurious

9. For other reasons apparent to the Court.

COCHRAN & BOZEMAN,
Defendant's Attorneys.

(Transcript pp. 94–96).

The Court refused the instruction, which was exhibited with the foregoing motion, and was presented to the Court in the following words:

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"1. The Court instructs the jury to find for the defendant" (Transcript, p. 96).

To which action of the Court, the defendant then and there excepted.

The Court instructed the jury "to find for the plaintiff in the sum of the excess of $2,000 paid the defendant by the plaintiff on the loan of $2,000 made in June 1894, together with interest at six per cent. per annum from July 7, 1899, to date" (Transcript, p. 93).

There was a verdict in favor of plaintiff in the court below, which was followed by a judgment, and thereupon, the defendant moved the Court to set aside the verdict of the jury and the judgment rendered thereon:

"1. Because the Court erred in refusing the peremptory instruction asked by the defendant.

2. Because the Court erred in denying the defendant's motion for a peremptory instruction."

And for other causes assigned (Transcript, pp. 96–97).

The Court overruled and denied said motion, and thereupon, the judgment of the lower court against the defendant became final.

The plaintiff in the court below also moved to set aside the verdict of the jury and to grant a new trial, and this motion was likewise overruled; whereupon, an appeal and cross appeal were prosecuted to the Supreme Court of the State of Mississippi, where the appellant, in that court and also in this, filed an assignment of errors, including among others the following:

"1. The court below erred in overruling the motion of appellant (defendant below) for leave to amend its notice under the general issue, and in striking out the amendment filed by defendant below, of date April 20th and August 6th, 1901.

2. The court below erred in overruling appellant's motion for a peremptory instruction.

3. The court below erred in refusing the peremptory instruction asked by appellant" (Transcript, p. 103).

The Supreme Court of Mississippi affirmed the judgment below on direct appeal, and reversed same on cross appeal; this action of the Court in both respects being adverse to the contention of appellant on the Federal questions involved and urged by it, and from this decision an appeal has been prosecuted in this cause.

The judgment of the Supreme Court of the State of Mississippi appears on pages 103 and 104 of the Transcript, and the opinion of the Supreme Court, rendered by WHITFIELD, C. J., appears on pages 104 to 116 of the Transcript.

Mississippi Courts take judicial notice of the Statutes of other States.

Under the statutes of the State of Mississippi, the Courts of that State take judicial cognizance of the laws of other States, as they do of the laws of Mississippi, and for this reason the statute of Mississippi and of New York relied upon were not given in evidence, and do not appear in the Transcript.

Section 939 of the Annotated Code of Mississippi, in force since November 1, 1892, provides as follows:

"(2296) COURTS TO TAKE NOTICE OF LAW OF OTHER STATES.—When any question shall arise as to the law of the United States, or of any other state or territory of the United States, or of the District of Columbia, or of any foreign country, the court shall take notice of such law in the same manner as if the question arose under the law of this state."

Assignments of Error by the National Mutual Building and Loan Association, of New York, Defendant and Appellant.

IN THE SUPREME COURT OF MISSISSIPPI.

THE NATIONAL MUTUAL BUILDING AND LOAN ASSOCIATION OF NEW YORK

vs.

FRANK V. BRAHAN.

"The National Mutual Building and Loan Association of New York, appellant in connection with its petition for writ of error makes the following assignment of errors in the final judgment rendered in said cause and the proceedings had prior thereto.

1. The said Supreme Court of Mississippi erred in the rendition of said final judgment in said cause in that thereby it deprived the appellant, which is a New York corporation, of its liberty to contract and of its property without due process of law in violation of Section 1 of the 14th amendment of the Constitution of the United States.

2. And in that by the rendition of said final judgment said Supreme Court deprived the appellant without due process of law and in violation of Section 1 of said 14th amendment to said Constitution of the United States, of its liberty to make a contract in the State of New York, with its shareholder residing in Mississippi; said contract being valid under the laws of New York and performable in the State of New York.

3. And in that, by the rendition of said judgment, the said Supreme Court deprived the appellant, without due process of law and in violation of Section 1 of the 14th amendment to the Constitution of the United States, of its liberty to advance money to its shareholder residing in Mississippi, and of its liberty to contract with its shareholder in the state of New York, to repay said money in the State of New York.

4. And in that, by the rendition of said final judgment the said Court deprived the appellant, a New York corporation, without due process of law and in violation of Section 1 to the 14th amendment to the Constitution of the United States, of its money and property advanced to one of its shareholders and due the appellant under a contract performable in New York and valid and enforceable under the laws of the State of New York.

5. And in that by the rendition of said final judgment the said Supreme Court denied to the appellant the equal protection of the laws in violation of section 1 of said 14th amendment to the Constitution of the United States.

6. And in that by the rendition of said judgment the said Supreme Court deprived the appellant's shareholder without due process of law of his liberty to make a contract performable in New York to the injury of appellant and in violation of section 1 to the said 14th amendment of the Constitution of the United States.

7. And in that by the rendition of said judgment of the said Supreme Court erred in not giving full faith and credit to the public acts, records and judicial proceedings of the State of New York and particularly chapter 122 of the Laws of New York of 1851, and the acts amendatory

thereof, under which appellant was incorporated and the articles of association of appellant and the decision of the Supreme Court of New York in the case of Association v. Read, 93 N. Y., 474, and the other cases upholding the validity of contracts similar to the contract herein questioned in violation of section 1 of article 4 of the Constitution of the United States.

8. And in that by the rendition of said judgment the said Supreme Court erred in applying to the contract herein questioned the declaration of public policy first announced by the Supreme Court of Mississippi in the case of Sokoloski vs. New South Building and Loan Association, 77 Miss., 155, and the decision following the same. which declaration of public policy made long after the making of the contract here in question was tantamount to judicial legislation, and as to this contract was in effect the passage of a law both *ex post facto* and impairing the obligation of said contract and was in violation of section 10 of article 1 of the Constitution of the United States.

9. And in that by the rendition of said judgment the said Supreme Court of Mississippi impaired the obligation of the contract in question in violation of said section 10 of article 1 of the Constitution of the United States.

Wherefore the said National Mutual Building and Loan Association of New York, plaintiff in error, prays this honorable Court to examine and correct the errors assigned and for a reversal of the judgment of the Supreme Court of Mississippi entered in said cause.

MARCELLUS GREEN,
J. S. SEXTON &
A. S. BOZEMAN,
Attys. for Plaintiff-in-Error."

14754

BRIEF.

The General Nature of Building and Loan Associations and the Relations Existing Between the Parties Hereto.

Before entering into an argument of the questions involved in this case, it may be helpful to the Court to briefly review the general nature of building and loan associations, and of the relations existing between the parties to this controversy.

In his introduction of the subject of "Building Associations," Endlich, in the first paragraph of his work, says:

"The building association is an institution in modern society. Its plan was designed to meet the wants and accommodate itself to the peculiarities of men, whose little earnings can be only slowly raised to an effective bulk. As a corporation, it is the creature of legislative policy, and not of legislative caprice. In its essential plan and nature it is the same all over the world, springing from the same considerations, ministering to the same necessities, achieving the same results. The similarity existing between the statutes and usages relating to building associations in the various States and countries is neither accident nor simply immitation. It is at once the evidence and the recoguition of identical requirements of society in the various communities."

In the sixteenth paragraph of his work, this author defines a building and loan association as follows:

"A building association, then, is a private corporation for gain, erected for such time, limited or unlimited, as may be permitted by the laws

under which it is incorporated, for the accumulation, from fixed periodical contributions of its shareholders in payment of the stock subscribed by them, the penalties for their non-payment and the profits upon their investment, of a fund to be applied, from time to time, in accommodating such shareholders with loans or advancements, primarily for the purpose of acquiring the free possession of real estate, or constructing dwellings, or both, under terms and regulations prescribed by legislation, or reasonably and lawfully ordained by charter and by-laws of the association, upon principles of strict mutuality and equality of benefits and obligations, with the effect of extinguishing the liability incurred for such loans and advancements, simultaneously with the termination of the shareholder's periodical contributions upon the stock held by him in the association; the object of the latter being completed when the fund raised is sufficient to distribute to each member the par value of all shares subscribed by him and held without loans, and to extinguish all loans held by shareholders."

Thompson, on "Building and Loan Associations," defines the building and loan association as follows:

"The building association, as now existing, is a private corporation, designed for the accumulation by the members of their money, by periodical payments into its treasury, to be invested from time to time in loans to the members upon real estate for home purposes, the borrowing members paying interest, and a preference in securing loans over other members, and continuing their fixed periodical instalments in addition, all of which payments, together with the non-borrower's payments, including fines for failure to pay such fixed instalments, forfeitures for such continued failure of such

payments, fees for transferring stock, membership fees required upon the entrance of the member into the society, and such other revenues go into the common fund, until such time as that the instalment payments and profits aggregate the face value of all the shares in the association when the assets after the payment of the expenses and losses, are pro-rated among all the members, which, in legal effect, cancels the borrower's debt, and gives the non-borrower the amount of his stock. A building society is not a benevolent institution; nor is a corporation organized for the purpose of dealing in real estate or carrying on any kind of real estate business in which natural persons may engage, a building association."

Thornton and Blackledge on "Building and Loan Associations," defines a building and loan association in the following words:

"A building association may be defined as a society (generally incorporated) organized for the purpose of creating a fund derived from periodical payments by persons upon stock subscribed for by them, as well as from fines, forfeiture and incidental fees; and if the shareholder be also a borrower, by the payment of premiums and interest; which fund is to be loaned to its members secured by mortgage upon real estate to enable them to secure homes; such payments to continue until the sum of payments and profits on each share equal its face value (after deducting necessary expenses incident to the management of the society's business), at which point of time all the shares of such members as are matured, are canceled or extinguished."

In Section 4, under the heading "Favorably Received by Courts," will be found the following:

"Societies, known as building, loan fund, and savings associations, are now recognized as im-

portant factors in the social and economic development of this country. The controlling idea is the massing of the separate earnings of wage-workers, and the savings of persons of small means, in such a manner as to aid them in procuring homes. It is the organization of thrift and self-help; a practical application of the maxim that in 'union there is strength.' The effect of such a movement is to dignify the home; to foster morality, and to make thoughtful, wise, and responsible citizens. It is for such reasons that the law and the courts, where such associations have been properly conducted, have looked upon them with favor."

Under the heading of "General Scope and Methods of Associations," in Section 5, we find the following:

"The conditions which make building, loan, and savings associations or societies desirable are necessarily the same everywhere. It is one of the ordinary manifestations of the development of an industrial people. The methods, the objects, and the remedial measures required are in the main the same.

The method followed by the earliest English societies has been described by an English author as contemplating the purchase of a plot or plots of land with or without some tenements upon it; and after it had been built on at the society's expense the said tenements were all allotted and mortgaged to the society in some instances, or let to members or others at a fair rental, and this mode of operation carried on until every member was in possession of a freehold estate, or had received the amount of his share in full.' This plan, however, had not sufficient flexibility to adapt itself to the needs of the members, so that the attribute of a loan company became one of the

necessary conditions of their successful operation.

As associations are now ordinarily conducted, there must be the payment of stipulated dues; there would naturally be a time fixed when a share would probably mature and when the payments made upon stock would be supposed to equal the face value of the same; when a loan fund had accumulated, the question naturally arises as to the manner in which allotments shall be made to those desiring to borrow, results in the payment of a premium by, and an award, to the highest bidder; that, although membership implies the prompt payment of instalments when due, yet that many would probably fail to pay, and that such sums would therefore, be withheld from the earning fund of the association and its profits decreased; that, therefore, such persons should pay a fine, presumed to be equal to the earning capacity of the amounts so withheld; that if from any cause a member might desire to withdraw from the association, after having entered into an agreement to pay upon his stock to maturity, he should be permitted to do so only upon such terms as would work no detriment to the remaining members."

An examination of the authorities on the subject will disclose the fact that the law with reference to building and loan associations differs in many respects from the general law of corporations.

In Endlich on "Building and Loan Associations" (2nd Edition), Section 461, it is said:

"The peculiar relation of the stock in building associations to the purposes and existence of the corporation has already been indicated. The aim of the corporation, from a purely financial point of view, is so to employ the payments made to it from time to time upon the shares of stock held by its members in the way of interest, fines or

premiums, in short all its revenues from whatsoever source, as to bring the value of its capital stock as speedily as possible up to a certain predetermined figure per share; or what amounts to the same thing, to accumulate a fund sufficient to liquidate every advanced share at its fixed par value, and at the same time to cancel every advanced share as a complete set-off against, and simultaneous with the extinguishment of, the obligation given for the advance."

In the same work it is said (see Section 12):

"The capital or stock, that is to say, the fund which the association expects to have accumulated within the period fixed for its duration, and the readiness of which to be divided in cash or by cancellation of obligations marks that period, is divided into shares, to which is given a fixed par or paid-up value. * * * The actual value of the share, which is quite a different thing, may be very small indeed, during the first years of the society's life. But the par or paid-up value is fixed from the beginning. When the two coincide the course is run, for, whilst in manufacturing and other business corporations, the capital stock is merely the instrument through which their objects are effected, and its payment, at least to a large proportion, a pre-requisite to their operations, building associations have accomplished the purposes of their organization the moment the stock, by virtue of the periodical payments made by its members, and the gains realized therefrom and placed to the credit of the association, each member having an interest therein, proportionate to the number of shares held and paid on by him—is paid up to the amount ascertained and limited by the charter of the association. The fixed periodical payments to be made on each share of stock are the 'stock payments,' 'instalments,' 'subscriptions' or 'dues.' "

In the same work it is said (see Section 329):

"The peculiar principles of the building association scheme are fully developed in the transaction of loan or advancement between the association and its members. It is a matter of no slight difficulty, to convey an exact appreciation of the elements which may enter into this transaction in their relation to one another, and so to penetrate and analyze its complicated nature, as to present, at once, all its divers phases in a homogenous and consistent aspect. *It is necessary, in order to accomplish this purpose, to exclude, from the outset, the consideration of all contracts which do not partake of the distinctive properties of the building association loan, in its legitimate character, keeping in view its legitimate results.* This transaction is made up as follows: (1) A member holding a certain interest in the ultimate achievements of the association, conditioned upon its fulfillment of the duties of its members, may, instead of waiting for the realization of its prospects upon final settlement, anticipate their contemplated result by obtaining from the society an advance bearing a certain proportion of the same. (2) In consideration of the preference thus accorded him over his fellows, the requirements of strict mutuality constrain him to yield to the society a return, in the shape of a sum of money, premium, or bonus, which he agrees to pay it, not only commensurate with the advantage he has from the accommodation, but also being a contribution to the common treasury of the association, designed to be, in a measure, an indemnification to others who have been postponed to him in the competition for such preference, in which his peculiar circumstances and necessities have justified him in overbidding them. (3) He accepts a liability to reimburse the association for the outlay it has made in

his favor, for the measure of which reimbursement the business affairs of men furnish only a single universally just and adequate basis, that of principal and interest. * * *"

"Section 125. The building association, in its turn, assumes certain corresponding obligations toward the borrower. * * * (2) It agrees to let him have the use of the money advanced during the continuance of the society's legal right, or the running of a series, provided he lives up to the terms of his undertaking."

Federal Question Properly Presented in Due Time.

The record in this case shows that the federal questions were properly raised in due time, and that they were decided adversely to the defendant in the Court below.

Section 686 of the Annotated Code of Mississippi is as follows:

> "(1550). Notice of Special Matter under General Issue.—If the defendant desire to prove under the general issue in an action any affirmative matter in avoidance, which by law may be proved under such plea, he shall give notice thereof in writing, annexed to or filed with the plea, otherwise such matter shall not be allowed to be proved at the trial; and the defendant may, in all cases, plead the general issue and give writen notice therewith of any special matter which he intends to give in evidence in bar of the action, and which he would be otherwise obliged to plead specially; and, when such notice shall be given by the defendant, the plaintiff shall, before the trial of the cause, file a written notice to the defendant of any special matter which

he intends to give in evidence in denial or avoidance of such special matter so given notice of by the defendant, and which it would have been necessary to reply specially had the defendant's defense been specially pleaded; and if notice be not given as required, evidence of such matters shall not be admissible on the trial."

Under this provision of the Code, the defendant, in the Court below, first filed a plea of the general issue and gave notice thereunder, that the defendant association was a New York corporation, domiciled in the City of New York, where all of its business was transacted; that it had no branch office in the State of Mississippi. Thereupon, the defendant, in the Court below (plaintiff in error here), set out at some length the articles of association under which it was incorporated, and the history, nature and character of the contract existing between the parties, as well as the details of the final settlement made between the parties hereto (Transcript, pp. 7-14).

The general issue and the first notice thereunder was filed on the 27th day of September, 1899 (Transcript, p. 14).

On the 6th of August, 1901, the defendant association, by Cochran & Bozeman, its attorneys, filed a motion in the Circuit Court of Lauderdale County to amend its notice under the general issue as follows.

"IN THE CIRCUIT COURT,
APRIL TERM, 1901.

F. V. BRAHAN
vs.
NATIONAL MUTUAL BUILDING AND LOAN ASSOCIATION.

And the defendant moves the Court for leave to amend its notice under the general issue by adding thereto the amendment herewith shown to the Court, and in this connection the defendant shows to the Court that the said proposed amendment will not in any way delay the final hearing of said cause, but that said amendment is necessary in order that the merits of the controversy may be fairly brought to trial.

COCHRAN & BOZEMAN,
Defendant's Attorneys."

The amendment sought to be filed in connection with this motion was as follows:

" F. V. BRAHAN
vs.
NATIONAL MUTUAL BUILDING AND LOAN ASSOCIATION.

AMENDMENT TO THE NOTICE UNDER THE GENERAL ISSUE.

And the defendant by leave of the Court first obtained, amending its notice under the general is-

sue, will further show and prove that each of the contracts in question is good and valid, and not usurious under the laws, public acts, records and judicial proceedings of the State of New York, where each of said contracts was made and is enforceable, and by which acts, records and judicial proceedings the validity of said contracts is to be construed and determined; that under Section 1, Article IV of the Constitution of the United States, the defendant is entitled to have full faith and credit given by the Courts of this State to said public acts, records and judicial proceedings of the State of New York; wherefore defendant sets up and relies upon said Section 1 of Article IV of the Constitution of the United States, under and by virtue of which it is the duty of this Court to uphold the validity of said contracts as being enforceable and not usurious.

And the defendant further relies upon Section 10 of Article I of the Constitution of the United States in which it is provided that 'No State shall pass any law impairing the obligation of contracts * * * *' and Section 1 of Article XIV of the amendments of the Constitution of the United States in which it is provided '* * * nor shall any State deprive any person of * * * property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' and says that it is entitled to have this Court give full force and effect to said provisions of the Constitution of the United States in construing said contracts and determining this case, and that under said provisions of the Constitution the said contracts are valid and enforceable and not usurious.

COCHRAN & BOZEMAN,
Attorneys for Defendant."

(Transcript pp. 14-15.)

This motion to amend the notice under the general issue was filed on April 20, 1901, and on August 6, 1901, the defendant, while the foregoing motion was still pending and undisposed of, through its attorneys sought further to amend said notice under the general issue by setting out the facts that at the time that the stock of said association was issued to Brahan, and also at the time the loan in question was made to him, he was a resident and citizen of the State of Mississippi, and the defendant association was a resident and citizen of the State of New York, and that under the Constitution of the United States, and particularly under the Fourteenth Amendment, said Brahan, as a citizen and resident of the State of Mississippi, had a right to become a member of the defendant association and to procure the loans in controversy upon his shares of stock in said association on the terms and conditions set out in the contract between the parties; and particularly to make said contract payable and performable in the State of New York, and that the defendant association had the right to make the said loans to plaintiff, payable in New York, and to have said contracts, which were New York contracts, construed and determined by the laws of the State where they were performed.

That the defendant relied upon Section 10 of Article I of the Constitution of the United States providing that "no State shall pass any *ex post facto* law, or law impairing the obligations of any contracts," and at the time the loans in controversy were made, there had been no legislation in the State of Mississippi, nor any decisions by the Supreme Court of said State defining the public policy of the State with reference to such contracts as existed between the parties. And the defendant insisted that the decision of the Su-

preme Court of the State of Mississippi, in the case of Sokoloski vs. The New South Building & Loan Association, in so far as it undertook to set up and define the public policy of the State in regard to contracts of foreign building and loan associations making loans in Mississippi, which was rendered long subsequent to the date of the contract in question, and all cases following this decision, was contrary to the provisions of Article I, Section 10 of the Constitution of the United States.

Defendant further sought to amend its notice to show that to apply the principles announced in the Sokoloski case, and those following it, to the contract between the parties in controversy, would be to violate the provisions of Section 1 of Article IV of the Constitution of the United States and "to deny full faith and credit to the decisions, public acts, records and judicial proceedings of the State of New York. (Transcript, pp. 16-17.)

There was filed with this proposed amended notice, an affidavit, made by one of the attorneys for the defendant, to the effect "That said proposed amendment is necessary in order to bring the merits of the controversy between the parties fairly to trial. That the final trial of said cause will in no way be delayed by the filing of said amendments, and said amendments are not asked to be filed for the purposes of delay, but that the merits of said cause shall be fairly brought to trial." (Transcript, p. 15.)

This proposed amendment to the notice under the general issue was filed August 6, 1901.

On October 10, 1901, plaintiff, in the court below, made a motion to strike out the amendments to the notice under the general issue, which motion was as follows:

"The State of Mississippi,
Lauderdale County.

In the Circuit Court Term, 1901.

F. V. BRAHAN
Plaintiff,

vs.

THE NATIONAL MUTUAL BUILDING AND LOAN ASSOCIATION, OF NEW YORK,
Defendant.

Plaintiff, by attorneys. moves the Court to strike out the amendments to notice under the general issue, filed with the clerk of this court on April 20, 1901, and the motion and amendment to pleas of defendant, filed with the clerk of this court on August 6, 1901, leave of the Court not having been first obtained in either filing;

And because; issue had previously been taken by the pleadings in the cause, and time for pleading has long since expired.

2nd. Because, the defendant made an attempt to remove the cause to the Federal Court at an earlier term of this court, which application was made after the first, or return term of this court, and the application was denied.

3rd. Because, the principal amount now involved, as is shown by the agreed statement of facts in this case is under $2,000.00.

And because, lastly, the said motion and amendments to the pleadings sought to be

filed are not available to defendant, under the constitution, laws and decisions of the Supreme Court of this State.

FEWELL & SON,
Attorneys for Motion."

Filed: October 10th, 1901.
W. D. Cameron,
Clerk."

In this connection, we desire to call the attention of the Court to the fact that this motion was filed on October 10th, 1901, whereas, the first notice to amend was filed on April 20th, 1901. The Court refused the motion made by the defendant in the court below to file the amended notices hereinbefore referred to, and sustained the motion to strike out said amended notices, and entered the following order thereon:

F. V. BRAHAN

vs.

THE NATIONAL MUTUAL BUILDING AND LOAN ASSOCIATION OF NEW YORK.

5324.

This cause coming on to be heard on the motions of the defendant to allow it to file certain amendments to the pleas of defendant, heretofore filed, and also the motion of plaintiff to strike out the amendment to notice under the general issue filed with the clerk of this court on April 20, 1901, and the motion and amendments to pleas of defendant filed with the clerk of this court on August 6, 1901,—all being filed without leave of the Court—and the Court having heard and considered both of said motions:

It is considered by the Court that the defendant's motion be and the same is hereby overruled and denied, and that plaintiff's said motion be and the same is hereby sustained, and that defendant's said amendments of date April 20th, and August 6th, 1901, be stricken from the file of said cause. To which action of the Court defendant then and there excepted.

Filed October 16th, 1901.

W. D. Cameron, Clerk,
by I. L. McElroy."

No opinion was filed by the Judge of the Circuit Court on the motion to file the amended notices under the general issue, and to strike out the same, and no reason is assigned for striking out the amended notices, raising the serious constitutional question sought to be raised thereby.

We respectfully submit that, in view of the provisions of Section 717 of the Annotated Code of Mississippi, 1892, there was no room for the plaintiff in the Court below, to complain that these amended notices were filed too late. That section provides for the allowance of amendments, and is as follows:

"Amendments allowed: The Court shall have full power to allow all amendments to be made *in any pleading or proceeding at any time before verdict so as to bring the merits of the controversy between the parties fairly to trial*, and may allow all errors and mistakes in the name of any party, or in the form of the action to be corrected; and the Court shall require all such amendments to be made on such terms, as to costs and delay, as may be proper to prevent surprise or undue advantage. Either party may except to the decision of the Court allowing or refusing amendments, and the same may be assigned for error."

It is probably safe to say that in no state in the Union is the practice of its Courts more liberal in the allowance of amendments in order, as stated by the statute, "to bring the merits of the controversy between the parties fairly to trial," than it is in the State of Mississippi. In the case of Miller vs. Northern Bank, 34 Mississippi, 412, it was held that "*Four years after the commencement of the suit will not be too late for the plaintiff to apply for leave to amend* his declaration so as to make it correspond with the proof contained in a deposition if the application be made at the first term after taking the deposition, and if it do not appear that the plaintiff knew the facts before the deposition was taken." In the case of Allen vs. Standifer, 57 Mississippi, 612, the Court held that "After two terms on issue joined upon the affidavit for writ of seizure (under Act 1876) if both parties be ready for trial the plaintiff may even then tender a statement of this claim as required." In the case of Weathersby vs. Sinclair, 43 Mississippi, 189, the Court held that "A plaintiff who has commenced a personal action may, after plea, change his action and substitute for his declaration in *assumpsit* a petition *in rem* to enforce a mechanic's lien."

In Brame & Alexander's Mississippi Digest, on page 16, Section 2, under the head of "Construction of Statute," the rule in Mississippi in reference to the statute in question is stated as follows:

"The statute requires amendments to be liberally allowed. *It allows almost anything that the controversy may be brought to trial on its intrinsic merits.* Rodgers v. Kline, 56 M., 808; Stewart v. Hollins, 47 M., 711; Hodges v. Darden, 51 M., 200; Brown v. Ashford, 56 M., 677."

In the first case cited above, Rodgers v. Kline, the defendants sought to amend their pleas, just as the defendant, in this cause, sought to amend its

notice under the general issue, which is but another method of pleading under the statutes of Mississippi hereinbefore cited and quoted. But in that case, the amendment was sought to be made *"at the close of the evidence and after the charges had been passed on by the Court."* Whereas, in the instant case, the first notice and motion to amend was offered to be filed six months before the motion to strike out was made, and the second notice to amend was offered to be filed two months before the motion to strike out was made.

In the case of Rodgers v. Kline, the Supreme Court of the State of Mississippi held that the action of the lower Court, in refusing the amendment of the pleas offered as above indicated, was erroneous. The Court said in reference thereto, "The Court had the power to allow the amendment at any time before a verdict * * *. There was no pretext that it would operate as a surprise to the adverse party, as the investigation had proceeded just as if the amendments had been previously made. Amendments should be liberally allowed, in the furtherance of justice, and in this instance we can perceive no good reason for refusing the application of the defendants."

Section 542 of the Annotated Code of Mississippi provides for amendments of pleadings and proceedings in the Chancery Courts of that State, and is as follows:

"Amendments Liberally Allowed.—Amendments shall be allowed in the pleadings and proceedings, on liberal terms, to prevent delay and injustice."

Under this statute the Supreme Court of the State of Mississippi held, in the case of Hanserd v. Grey, 46 Miss., 75, that "Amendments may be allowed after a reversal of the case in the Supreme Court if the applicants have not been guilty of negligence."

In the case of Jeffries v. Jeffries, 66 Miss., 216, it was held that, "Even if the case be set for final hearing, it is error to refuse an application to amend the bill so as to cure a variance between its allegations and the evidence where the complainant had not been guilty of negligence in not asking to amend before that time."

The last expression of the Supreme Court of Mississippi, so far as we are advised, which would throw any light on this subject, is found in the case of Hart v. Potter, 80 Miss., 797, reported in 1902.

In that case, as shown by the reporter's statement of the same "The object of the suit was to cancel clouds upon the title to land. *After the case had been submitted to the Court below for final hearing on the merits,* complainant asked leave to file an amended bill, which was presented to the Court, the nature of which is apparent from the opinion of the Supreme Court. The application to amend was denied by the Court below and a final decree was rendered for defendants, and the complainant appealed to the Supreme Court."

Terral, J., delivering the opinion of the Court, used the following language:

"An application to amend a bill of complaint after the cause had been submitted for consideration, and decision comes so late in the proceedings that the granting of it is largely within the discretion of the chancellor, and where the evidence of the fact sought to be inserted in the bill might be manufactured for the occasion, it is usually denied. But where, as here, the evidence of a fact in the chain of complainant's title is a part of the public records of the country, which may not be altered or affected by any ingenuity of pleading or false swearing of a witness, * * * we think a sound discretion would have justified the amendment.

Wherefore the decree dismissing complainant's bill is reversed, and the case is remanded to the docket of the Chancery Court with leave to complainant to amend his bill within thirty days from the time the mandate is filed therein."

In this connection we call the Court's special attention to the fact that the amendments proposed in the Court below *raised no question of fact,* and really there are no disputed questions of fact to be found in this case anywhere, but all the questions involved are *questions of law;* and it certainly does seem that when grave constitutional questions are presented to a Court *four months before the trial* of a case in one instance, and *two months before trial* in the other, such questions should be entitled to sufficient consideration to keep them from being stricken from the record without even assigning a reason therefor upon such a motion as was filed in this case, in response to which such action was taken.

When we come to examine the motion, hereinbefore set out at length, we find it almost impossible to understand how it could seriously have been presented to, much less sustained by, any Court with any sort of regard for constitutional rights.

In view of the authorities hereinbefore quoted, it is impossible to believe that the Court could have concluded that there was any merit in the first ground upon which the motion was placed, viz., that the "time for pleading has long since expired."

Turning to the second ground of the motion we find, as one of the causes assigned for striking out the amended pleadings, that "the defendant made an attempt to remove the case to the Federal Court at an earlier term of this Court * * * and the application was denied."

Who ever before heard that a constitutional question could not be raised in a case because some pre-

vious motion, made by the party seeking to raise the same, had been denied in the same case? Who ever supposed that the right to assert a constitutional question involved in a case was dependent upon the right of the party seeking to raise the same to remove that particular cause to the Federal Courts?

Again, the third ground alleged as a reason for striking out the pleadings which were stricken out in this case is that "The principal amount now involved * * * in the case is under $2,000.00." The natural corollary of this proposition is that in cases involving less than $2,000.00, the constitution does not apply.

"Lastly," it is stated in the motion that "the said motion and amendments to the pleadings sought to be filed are not available to defendant under the constitution, laws and decisions of the Supreme Court of this State." The necessary corollary of this proposition is that where there is a conflict between the Constitution of the United States and the Constitution, laws and decisions of the Supreme Court of Mississippi, the latter must prevail, which, to say the least of it, is a new legal proposition.

As will hereinafter appear, the Federal Courts of Mississippi and the Supreme Court of that State have adopted altogether different views in reference to contracts like the one in question here, and the all controlling idea underlying the action of plaintiff in the Court below seems to have been to steer clear of Federal Courts and Federal questions, and that idea alone seems to furnish an explanation of the action of the lower Court in passing upon the motion just reviewed.

Constitutional Rights Cannot Be Stricken Down by Arbitrarily Striking Out Pleadings Seeking to Present Such Questions.

If we were without authorities upon the subject, we would affirm with confidence that constitutional rights could not be disposed of by the arbitrary ruling of any Court in striking out any pleading by which such constitutional right was sought to be presented, but fortunately we find this proposition sustained in the opinion delivered by Justice Harlan in the case of Kipley v. State of Illinois, *ex rel.*, Akin, 170, U. S., 182.

In this case the Attorney General of Illinois filed an original petition in the Supreme Court of that State against Joseph Kipley, superintendent of police of the City of Chicago, for the purpose of having an act of the legislature of the State of Illinois, entitled "An Act to regulate the civil service of cities," interpreted and for relief thereunder.

Kipley filed a separate answer, in which he insisted that he had acted in all respects in conformity with law. In this answer he raised no question of the constitutionality of the act upon which the petition was based. It is true that he did allege in his answer that the act in question was "unconstitutional and void," but this Court held that such an averment "is not sufficient to raise a Federal question, but is to be taken as applying to the Constitution of the State, and not to the Constitution of the United States."

Subsequent to the filing of the original answer in this cause, Kipley asked leave of the Court to withdraw his plea, filed in the mean time, and also to amend his answer so as to embody certain Constitutional objections to said civil service act. His

application for leave to withdraw the plea and to amend his answer, as above indicated, was denied by the State Court and no exception was taken to the ruling of the Court in denying such application. It was insisted in this Court that "the motion for leave to amend the answer did specifically set up and claim that the Illinois civil service act violated certain rights, privileges and immunities belonging to the plaintiff in error under the Constitution of the United States."

In answer to this position this Court held that "as the Supreme Court of Illinois did not allow the proposed amendment of the answer, the question suggested by the amendment did not arise for determination. To the action of the Court in disallowing the amendment no exception, was taken." In this case in passing upon the question of whether this Court should consider the Federal question sought to be presented by the motion to amend, this Court said:

"The grounds upon which these motions were denied appear from the opinion of the Court as follows: 'By this motion respondent Kipley asks, first, for leave to withdraw his plea; second, to file an amended answer; and third, to file a supplemental answer. Nothing more is before us than the bare motion. No showing has been made nor reasons filed in support of the motion, and we are unable to say whether the motion should be allowed or not, and it must therefore be overruled.' People, Akin, v. Kipley, 176 Ill., 638. This action of the State Court does not raise a Federal question which this Court can examine. The suggestion that the Federal questions which would have been raised, if the answer had been amended as proposed, should be considered upon their merits precisely as they might have been if the motion to amend had been allowed, cannot be entertained for a moment.

It was in the discretion of the Court to deny the motion to amend, when no reasons were assigned for its allowance, and to hold the parties to the issues made by the original petition and answers; and there is nothing in the record justifying the conclusion that its discretion, in that regard, was exercised with the intent or so as to deprive the defendant either of any right or immunity to which he was entitled under the Constitution or laws of the United States, or of the privilege of setting up or claiming in due time and in proper form any such right or immunity. It may be observed that the opinion of the State Court delivered upon final hearing contains nothing to show that any Federal question was considered or determined * * * The validity of the enactment in question was considered by that Court with reference only to the State Constitution."

The inevitable conclusion which arises from the foregoing statements by this Court is, that if the motion to amend in that case had been supported as it was in this case, by the affidavit of counsel that the amendment was necessary in order to bring the merits of the controversy between the parties fairly to trial, and that the final trial of the cause would not be delayed by the filing of said amendments, and that said amendments were not asked to be filed for the purpose of delay but in order that the merits of the case might fairly be brought to trial; and if exceptions had been reserved to the action of the Court in overruling the motion to amend, as was done in this case; and if the record had disclosed any fact justifying the conclusion that the discretion of the lower Court had been exercised either with intent to deprive the defendant of any right or immunity which he was entitled to claim under the Constitution or law of the United States, or of setting up or claiming the same; *or*

in such a way as to result in such denial (as was done, whether so intended or not, in the instant case), then this Court would have treated the case just as if the motion to amend had been allowed.

Even if we are mistaken in reference to whether this Court should treat the record in this case as if the amendments had been allowed, we still have the Federal question clearly presented in the first notice filed under the general issues, which was never stricken out, and which was originally filed in connection with the plea of the general issue.

In this notice, the defendant set up and stated that "when said first mortgage was drawn and executed in May, 1892, the laws of Mississippi allowed building and loan associations by express statute to charge more than ten per cent. interest on loans and such interest as might be agreed upon by the parties to such loans." (Transcript, p. 8.)

This statement of the case was amply sufficient to bring to the notice of the Court that defendant, in the court below, claimed the protection incident to the contract clause of the Constitution of the United States (Art. 1, Section 10).

Again, in said original notice, defendant, in the court below, alleged "that said contracts, as shown in said bonds and mortgages executed by said plaintiff, *are New York contracts, and their validity is to be governed and determined by the laws of the State of New York where said contracts are payable.*"

This was simply another method of pleading that defendant had the right to insist, and did insist, upon the protection given by Section 1 of Article IV of the Constitution of the United States.

It is not at all necessary that the Federal questions presented in this case should have been made to appear on the record in direct and unequivocal terms, *in ipsissimis verbis*, but it is altogether suf-

ficient that they should have appeared as they did by clear and necessary intendment.

Crowell v. Randell, 10th Peters, 368.
Murray v. Charleston, 96 U. S., 432., 8th Wallace, 44.
16th Pet. 281; 125 U. S., 345.

The above cited cases clearly indicate that the section of the Constitution of the United States relied on in any given case need not be specifically set forth in the record, and that when the substance of the matter was presented to the State Court, that court must be presumed to have recalled such provisions of the Constitution of the United States as were necessarily involved in the case in controversy.

In Water Power Co. v. Street Railway Co., the Court said:

"To the argument that the Federal right was not specially set up and claimed in the language of the Revised Statutes, Section 709, it is replied that this is not one of the cases, in which it is necessary to do so. Under this section there are three classes of cases in which the final decree of a state court may be re-examined here." * * *

"But where the validity of a treaty or statute of the United States is raised, and the decision is against it, or the validity of a state statute is drawn in question, and the decision is in favor of its validity, this Court has repeatedly held that, if the Federal question appears in the record and was decided, or such decision was necessarily involved in the case and the case could not have been determined without deciding such question, the fact that it was not specially set up and claimed is not conclusive against a review of such questions here."

The same rule is supported by the case of Sayward v. Denny, 158 U. S., 180, and Oxley Stave

Company v. Butler County, 166 U. S., 648, and has been emphasized in the case of Eastern Building and Loan Association v. Welling, 21 Sup. Ct. Repr., 531.

It is sufficient if the Federal question be first raised in the assignment of errors in the State Appellate Court. In the case of Arrowsmith v. Harmoning, reported in 118 U. S., 194, the Federal question was first raised in the third assignment of error in that court, which was in the following words:

"3rd. That by affirming the judgment of the court of common pleas by said district court, this plaintiff in error was deprived of his right of trial by jury, contrary to the provisions of the Constitution of this State, and deprived of his property without due process of law, contrary to the provisions of the Constitution of the United States."

On a motion to dismiss and also to affirm on this state of the record, Chief Justice Waite delivering the opinion of the Court, said:

"This is the first time, so far as the record discloses, that even the semblance of a federal right was set up in the case, and even here it is not easy to see on what ground it could be claimed that Arrowsmith had been deprived of his property in violation of the Constitution of the United States. It was for this reason, perhaps, that the Supreme Court, while affirming the judgment of the district court, took no notice of this assignment of error in its opinion. The decision, however, necessarily involved a denial of the right which was claimed in this way, and thus we probably have technical jurisdiction. For this reason the motion to dismiss must be denied."

"When it is desired to secure the right to review the decision of a state court in the Supreme Court

of the United States, it is the safer practice to make it appear distinctly on the record by a statement either in the pleadings, or as the ground of an objection to the admission of evidence, or in support of an offer of evidence, *or a request to charge,* that a Federal question is involved. This is not, however, indispensable if the Supreme Court can see by an examination of the record that the Federal question was raised and decided adversely to the plaintiff in error."

> Foster's Federal Practice 2nd Ed., Section 477. Curtis on Jurisdiction of United States Courts, 37-39. 112 U. S., 123, 129; 119 U. S., 110, 116. 139 U. S., 293, 295.

In view of the various efforts of the defendant to get the benefit of the Federal questions urged in the lower court, hereinbefore referred to, and in view of the fact that in the Supreme Court of the State the action of the court below, in striking out the amendments raising the questions sought to be raised thereby, and in refusing the peremptory instruction asked by appellant, and granting the peremptory instruction asked by appellee, was specifically assigned for error, the following statement found in the opinion of the Supreme Court of Mississippi in reference to the effort of the defendant to present the Federal question in the Court below, seems to us to be in direct conflict with all of the authorities hereinbefore cited on that subject, as well as the authorities hereinbefore referred to in reference to the subject of pleadings in Mississippi.

"It is clearly shown that the appellant, after its motion to remove the cause to the Federal Court had been overruled July 29th, 1899, filed the plea of general issue, with elaborate notice on Septem-

ber 27th, 1899; that afterwards, without having first obtained leave of the Court, it filed on April 20th, 1901, some eighteen months after the cause was at issue, an amended notice—a wholly different notice—under its plea of the general issue; and that later, on August 6th, 1901, again without having obtained leave to do so, it filed an amendment to its pleas, and an amended—so-called—notice, wholly different from its first notice, some nearly two years after the cause had been at issue and ready for trial. This effort, by these amendments to the pleas and notice, were simply an afterthought, an effort, at that late stage, to inject a Federal question into the record. Appellant also asked an instruction, and filed a series of reasons why the instruction should be granted. It was an extraordinary procedure to file with a requested instruction a page or two of written reasons why it should be granted. The purpose was obvious. It was another ingenious, but unsuccessful effort to inject the Federal question into the record. If the Court had allowed the amended notice and pleas to be filed, which presented nothing on the merits, but simply the alleged Federal question, then there would have—an issue involving the Federal question, to which an instruction would have been appropriate. But the Court had very properly, in accordance with our statutes and practice, refused leave to file the amended pleas and notices, and stricken them from the files, on the obvious ground that appellant had presented them entirely too late —nearly two years after the cause had been fully at issue and waiting for trial. Such delay was gross laches, and the Court properly refused the leave to file them" (Transcript, pp. 115-116).

It will be seen from this statement quoted from the opinion of the Supreme Court of Mississippi, that that Court entirely overlooked the fact that

the original notice filed under the plea of the general issue contained *two distinct and sufficient statements of Federal questions relied upon,* as hereinbefore indicated and explained, which statements were amply supported by the proof in the case.

It will further be seen that that Court overlooked the fact that the Federal questions relied upon were distinctly set up in the assignment of errors filed in that Court (Transcript, p. 103).

This statement by the Supreme Court of Mississippi ignores the facts that the amended pleadings sought to be offered were presented months before the trial of the case and were accompanied with an affidavit of counsel that if allowed they would not delay the trial of the cause, and that the same were necessary to bring the merits of the controversy fairly to trial.

While we recognize the fact that ordinarily it is within the discretion of the Court where pleadings are first offered to determine whether such offer is a timely one and should be granted or declined, yet we insist that the action of the Circuit Court of Lauderdale County, which was affirmed on appeal by the Supreme Court of the State of Mississippi, inevitably resulted "so as to deprive the defendant * * * of the privilege of setting up or claiming in due time and in proper form" the questions sought to be raised by such amendments, and that this brings this case within the rule announced in the case of Kipley v. State of Illinois, *ex rel.*, Akin, 170 U. S., 182.

After all it is for this Court to determine whether there is a Federal question in the record, and whether its decision was inevitably involved in the Court below.

In the case of Arrowsmith v. Harmoning, 118 U. S., 194, the Supreme Court of Ohio absolutely ig-

nored the Federal question, or in the language of this Court "took no notice of this assignment of error (which raised the Federal question for the first time) in its opinion," and yet this Court, as we have hereinbefore seen, decided that it had jurisdiction of the case.

In the case of Des Moines Navigation and Railroad Company v. Iowa Homestead Company, 123rd U. S., 552, the Supreme Court of the State of Iowa referred to the Federal questions sought to be presented, but declined to consider the same, just as the Supreme Court of Mississippi did in the present case; but this Court reversed the judgment of the Court below, and referring to the action of the Supreme Court of Iowa, said:

"We cannot look upon the reason given by the Court below for not considering the question of prior adjudication as sufficient for avoiding the decision of a controlling Federal question fairly presented by the pleadings, proofs and assignments of errors, and necessarily involved in the determination of the case. That question stood in the very front of the litigation and if decided in favor of the Navigation and Railroad Company ended the whole matter. To give a judgment the other way without considering it was simply to ignore one of the most important elements of the case as it stood in the record. *There can be no escape from this conclusion.* * * * *Such action was in our opinion equivalent to a decision against the Federal right which was actually set up and claimed, and thus our jurisdiction for the review of the judgment on this question as well as the others is complete.*"

Having shown, as we think, that the Federal questions essential to the jurisdiction of this Court were raised and presented to the State Court in

the proper way and at the proper time, that their decision was necessary to the judgment rendered in the case, that the decision was against the rights claimed, or asserted by the plaintiff-in-error under the Constitution of the United States, it remains to be seen whether such claims of right were correctly adjudicated by the State Court, and, if not correctly decided, whether there is any other matter adjudged by the State Court sufficiently broad to maintain the judgment of that Court.

There is no independent ground, not involving a federal question, broad enough to maintain the judgment of the Supreme Court of Mississippi, found in the record.

We recognize the rule that "if there be more than one question in the record, and one of them is purely a State question, on which the State decision may stand," the writ of error will be dismissed without considering the Federal question.

Hopkins v. McLure, 133 U. S., 380.
Bacon v. Texas, 163 U. S., 207.
Beatty v. Fenton, 135 U. S., 244.

An examination of the cases just cited and of the other decisions of this Court sustaining the rule above announced, will disclose the fact that in all such cases there was a clear clean-cut, independent ground upon which the decision of the State Court could be rested without reference to any Federal question found in the record.

We take it that it will hardly be contended that the instant case furnishes any such independent ground upon which the decision of the Supreme Court of Mississippi and the judgment rendered thereon can be rested. An examination of the opinion of the Supreme Court, found in the record, will

show that there was no recognition by the Supreme Court of Mississippi of a Federal question in the record, and no undertaking on its part, while recognizing such question, to plant its decision upon any other ground, but the Federal question was ignored by the Court as shown by the opinion found in the record.

It is true, that the opinion of the Supreme Court discloses the fact that certain statutes and decisions of the Supreme Court of Mississippi, referred to therein, were relied upon in part as a basis of the decision reached in the instant case, but these statutes were enacted, and these decisions announced, subsequent to the date of the contract by which the appellee first became indebted to the plaintiff in error, at which time the status of the parties became fixed, and the record in this case is full of objections properly but ineffectually interposed in the Court below to the application of said statutes and decisions to the contract there in question.

In such a case, the opinion of this Court in Hopkins v. McLure, 133 U. S., 880, is directly in point.

Mr. Justice Blatchford, delivering the opinion of the Court in that case, referring to the contention of plaintiff in error, "that the decision of the Court below was based upon the application of the act of 1878 as a valid act affecting the contract of the plaintiff in error (which antedated the act) and impairing its obligation," said "but the validity of the statute (meaning the act of 1878) was not drawn in question, and the Supreme Court did not pass upon it. The decree of that Court does not rest upon that statute but upon independent grounds. *The decision rests upon a ground broad enough to cover the entire case without considering the statute.*"

There can certainly be no just contention in this

case that the decision of the Supreme Court of Mississippi rested upon a ground broad enough to cover the case without considering the statutes and decisions of that State which it was insisted should not be applied to the contract in question, and could not be applied thereto without denying "full faith and credit" to the decisions, public acts, records and judicial proceedings of the State where the appellant association was domiciled, and without impairing the obligation of the contract entered into by defendant in error and the plaintiff in error, and without denying appellant the benefit of "due process of law," and also that "liberty" and "equal protection of the laws" guaranteed by the 14th amendment to the Constitution of the United States.

The decision of this Court in the case of Bacon v. State of Texas, 163 U. S., 207, is peculiarly applicable to the facts disclosed in this record.

Mr. Justice Peckham, delivering the opinion of the Court in that case, used the following language:

"If the judgment of the State Court gives no effect to the subsequent law of the State and the State Court decides the case upon grounds independent of that law a case is not made for review by this Court upon any ground of the impairment of the contract * * * The case of Wilmington & W. R. Co., v. Alsbrook, 146 U. S., 279, decides nothing that is repugnant to it. In that case the jurisdiction of this Court was questioned on the ground that the contract of exemption mentioned in the act of 1834 was acknowledged to be valid by the Supreme Court of North Carolina, and it simply denied that particular property was embraced by its terms, and as a consequence it was claimed that the decision did not involve a Federal question. To which this Court replied speaking by Mr. Chief Justice Fuller as follows: 'In arriving at

this conclusion, however, the State Court gave effect to the revenue law of 1891 and held that the contract did not confer the right of exemption from its operation. *If it did its obligation was impaired by a subsequent law and as the inquiry whether it did or not was necessarily directly passed upon we are of the opinion that the writ of error was properly allowed.'"*

So, here, we insist that the inquiry whether the application of the statutes and decisions, referred to in the opinion, to the instant case, involved any of the Federal questions raised in the State Court, was inevitably involved and necessarily passed upon or ignored (which amounts to the same thing) by the Supreme Court of Mississippi, and the merits of such questions must be passed upon by this Court, notwithstanding the fact that the Supreme Court of the State of Mississippi treated the case as if there was no Federal question involved in it.

"If a Federal question is fairly presented by the record and its decision is actually necessary to the determination of the case, a judgment which rejects the claim but avoids all reference to it, is as much against the right, within the meaning of Section 709 of the Revised Statutes as if it had been specially referred to and the right directly refused."

Chapman v. Goodnow, 123 U. S., 540-548.

"Where the jurisdiction of this court is invoked upon the ground that a right or immunity specially set up and claimed under the Constitution or authority of the United States has been denied by the judgment sought to be reviewed it must appear from the record of the case either that the right so set up and claimed was expressedly denied or that such was the necessary effect in law of the judgment."

Edward Roby v. Chas. W. Colehour, 146 U. S., 153.

Merits of Federal Questions Presented.

We now come to the consideration of the merits of the Federal questions raised in the court below, which involve a proper construction of the contract obligation of the parties as fixed by the Articles of Association of the plaintiff in error and the statutes and decisions of the State of New York, together with the statutes and decisions of the State of Mississippi as sought to be applied to the case in hand.

We insist that the written contract, the Articles of Association of plaintiff in error, and the provisions of Chapter 122 of the Laws of New York, of 1851, and Chapter 564 of the laws of New York of 1875, are the measure, and only measure, of the rights and obligations of the parties hereto, and we further insist that this is just as true when this contract comes to be construed by the Courts of the State of Mississippi, as if the Courts of New York were called upon to construe the same contract.

"The charter of a corporation, or the statute under which it is organized, furnishes the guide in determining the liability of its stockholders to its creditors * * * The reason of this rule is obvious. A person guilty of no wrong ought not to be subjected to a burden or liability which he has not voluntarily assumed. And *by accepting shares in a foreign corporation* a person is rightfully supposed to have had in view the law governing such corporation and not the law of his own domicile, unless there is such a law specially applicable to his situation. On the other hand one who accepts shares of the stock in a foreign corporation takes upon himself the burden imposed by the charter of such corporation, or the law of its domicile by

which it is governed. *He is supposed, in a certain sense, to go into the state in which such corporation is domiciled; to cast off for a time the vesture which his own state throws around him and to put on that of such other state.* Nor can he plead ignorance of such laws any more than one can plead ignorance of the laws of another state when he makes a contract to be executed therein. Subject to exceptions, hereinafter stated, those laws are administered in the courts, state or federal in which the action to charge the stockholder is brought, *as rules of property* obligatory not only in the state enacting them but everywhere else."

Commentaries on the Law of Corporations by Thompson, 3rd Vol., Sec. 3046.

The exceptions, above referred to, are the well recognized rules that if there is any valid and operative legislation in the state of the stockholders domicile imposing some other or distinct liability upon him as a stockholder in a foreign corporation, the legislation of the stockholder's domicile will apply, and if the foreign statute is penal in its nature it can have no extra territorial operation and will not affect a non-resident stockholder.

Neither of the exceptions above referred to can apply with any sort of force here for the reason that the statutes of New York, in reference to the subject matter in hand, were in no sense penal, and there are no statutes in the State of Mississippi which impose upon a Mississippi stockholder in a foreign corporation any duty or obligation distinct or indifferent from that fixed by the law of the domicile of the foreign corporation of which he may happen to be a member, so that the rule above announced literally applies to the instant case, and, when the courts of Mississippi refused to recognize and apply the same, by such act, "full faith

and credit to the public acts, records and judicial proceedings of the State of New York, was denied to plaintiff in error, its contract with its stockholder was impaired, and it was further denied the equal protection of the laws," and "liberty" of contract guaranteed by the Constitution of the United States and the amendments thereof.

We take it that there will be no sort of contention here that the contract between plaintiff in error and defendant in error was not a valid contract duly enforceable according to the laws of the State of New York. Section 7 of chapter 122, passed April 10th, 1851, and entitled "An Act for the incorporation of building, mutual loan, and accumulating fund Associations" of the Laws of New York, is as follows:

"Every such corporation shall terminate except for the purpose of settling its affairs whenever all of the shares thereof shall be redeemed by advances thereon, or whenever the owners of unredeemed shares shall be paid the ultimate value thereof as provided in the articles of association and not sooner; but no dividend of principal or of profits shall be made until such termination, nor until all of the debts of the association shall have been paid or otherwise sufficiently provided for. No holder of redeemed shares shall claim to be exempt for making the monthly payments provided in the articles of association upon the ground that by reason of losses or otherwise the association has continued longer than was originally anticipated whereby the payments made on such shares may amount to more than the amount originally advanced, with legal interest thereon; nor shall the imposition of fines for nonpayment of dues or fees or other violation of the articles of association *nor shall the making of any monthly payment required by the articles of asso-*

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ciation or of any premiums for loans made to members be deemed a violation of the provisions of any statute against usury."

The Act of 1851 of the State of New York, from which the above mentioned section is quoted, is still in full force and effect in that State, as to corporations organized under it, with the exception of certain minor amendments which were made to the act by chapter 564 of the Laws of New York, 1875, and which have no sort of connection with this case.

The case of Association v. Read, reported in 93 N. Y., page 474, and other cases of similar character, leave no doubt as to the validity of the contract between the parties hereto when considered and treated as a New York contract.

The opinion of the attorney general of New York, found on pages 81, 82, and 83, of the Transcript, in reference to the legality of fixed premiums under the Act of 1851, chapter 122 of the Laws of New York, both because of its source and inherent force, is entitled to due consideration here and elsewhere.

In this connection we again call the Court's attention to the fact that under Section 939 of the Annotated Code of Mississippi, 1902, "when any question shall arise as to the law of the United States or of any other State or Territory of the United States * * * the Court shall take notice of such law in the same manner as if the question arose under the law of this State."

By reference to the terms of this statute it will be seen that the Courts of Mississippi take judicial notice of the laws of all of the other States of the Union" *in the same manner as if the question arose under the laws of this State."*

Of course every presumption of law is that the Courts of Mississippi not only take notice of the laws of Mississippi, but that they take a *correct* view thereof. In other words, it is only fair and

respectful to the Courts of Mississippi to assume that they have a correct knowledge of the laws of that State.

Under the statute above referred to and quoted, the Courts of Mississippi are required to take notice, or, in other words, to have knowledge of, the laws of the other States of the Union. This statute was intended to avoid the necessity of proof in cases involving the laws of other States, and as a matter of course, it was intended to supply the place of correct proof of such other laws, so that whenever, in the decision of any controversy, the Courts of Mississippi are required to construe the laws of other States, the decisions of those Courts are to be treated and acted upon just as if such decision was rendered with a full, accurate and discriminating understanding of the laws of the States passing under review.

This fact clearly differentiates the instant case from the recent case of Eastern Building and Loan Association of Syracuse, New York, v. Bright Williamson, decided by this Court and reported in the advance sheets containing the decisions of this Court delivered at the October term thereof, 1902.

There is no statute in South Carolina, such as is found in Mississippi, requiring the Courts of that State to take notice of the laws of other States, and it became necessary in that case to offer proof of the laws of New York, in reference to building and loan association contracts similar to the one involved in that case; and such evidence was offered, but the Supreme Court of South Carolina did not accept the view of the law offered in evidence by counsel for defendants in that case, and it was contended that in declining to do so that Court denied "full faith and credit to the public acts, records and judicial proceedings" of other States. This Court held in that case that "no witness can conclude a

Court by his opinion of the construction and meaning of statutes and decisions already in evidence," but that it was the province of the Court of South Carolina to construe the statutes, decisions, articles of incorporation and by-laws offered in evidence in such Court and that such construction did not involve a "denial of the full faith and credit," which, by U. S. Const., Article 4, Section 1, must be given by the Courts of each State "to the public acts, records and judicial proceedings" of other States.

It is worthy of notice that in this case the South Carolina Court took the same view of the contract in question which this Court and the Court of Appeals of New York, the State of the domicile of the building and loan association whose contract was being construed, adopted in reference to the contract there in question, but we do not contend that an erroneous construction of the contract, if such had been made by the South Carolina Court, would have involved a denial of "full faith and credit," &c.

Not so, however, in Mississippi. If the Courts of Mississippi fail to give that "faith and credit," which the Constitution of the United States requires, to the "public acts, records and judicial proceedings" of other States, they do so with full knowledge of the laws of other States imposed upon them by the statute of the State, hereinbefore quoted, and this amounts to a denial under the Constitution of that "faith and credit" guaranteed by the Constitution to the "public acts, records and judicial proceedings" of other States.

Defendant in Error Could Not Borrow Money of Plaintiff in Error Under the Laws of New York and Settle for the Same Under the Laws of Mississippi Enacted or Announced Subsequent to the Time when the Relations of the Parties Became Fixed.

The right to borrow money from the building and loan association of which he was a member, was an indisputable right incident to Brahan's membership in the appellant association, provided only that he complied with the rules of the association applicable alike to all members desiring to borrow money.

We have already seen in the quotation from Section 125 from Endlich on "Building and Loan Associations" (2nd Ed.) that "It (meaning the association) agrees to let him have the use of the money advanced during the continuance of the society's legal right, or the running of a series provided he lives up to the terms of his undertaking."

Not only is this the general law, but as heretofore seen under Article 13 of the articles of association of the appellant, "*any member can borrow on his shares ninety per cent. of the withdrawal value thereof upon executing* such note, bond or other instrument as the board of directors may require together with an assignment of the shares as security."

In this connection it will be remembered that defendant-in-error applied for membership in the appellant association and also for a loan from said association on the 30th day of April, 1892 (Transcript, pp. 68-69).

He was admitted into the membership of said association and borrowed the sum of $2,500.00 un-

der the rules and regulations of said association, and executed a bond for that amount, and an assignment of his shares of stock and a mortgage to secure said indebtedness on the 4th day of June, 1892. The bond provided for payments *"at the office of the association in New York City"*; it also provided that said defendant-in-error should *"truly keep and perform all the conditions herein contained and required by the articles of association of said obligee and by such amendments as may be lawfully made to said articles."*

The mortgage provided, among other things, *"for the payment of said sum of $2,500.00 to the said association at its office in the City of New York*, with interest for the same at six per cent. per annum until paid, together with a monthly premium of $12.50 for eight years, or until the earlier maturity of said shares should they mature before the expiration of eight years, and the sum of $15.00 for the monthly dues on the said twenty-five shares, which interest, premium and dues are payable monthly on or before the last business day of each and every month *at the office of the association in the City of New York*, until the maturity of said shares, except the monthly premium which is to be paid for eight years only." This mortgage was executed on June 4th, 1892 (Transcript, p. 106).

"And it is expressly agreed by and between the parties hereto that this mortgage is made with reference to and under the laws of the State of New York, which are to govern in enforcing and expounding this contract" (Transcript, p. 26)."

It will thus be seen that the relation of the parties hereto became fixed not later than June 4th, 1892, when said mortgage was executed and said loan was made.

This Court, in the case of H. L. Bedford, *et al.*, v. Eastern Building and Loan Association of Syr-

acuse, New York, reported in Volume 181 of the Reports of the decisions of this Court, decided and held that:

"The issuance of a certificate of stock to a member of a foreign loan association and his application for a loan made before the passage of a statute restricting the right of the association to do business in the state, constitute a contract, the obligation of which cannot be impaired by such statute; and, therefore, a loan made on that application after the statute was passed and to which his contract gave him a right is valid notwithstanding the statute."

The court further held, in the same case, that "A contract of a foreign loan association which is not usurious under the laws of the state where the association is domiciled, and where the obligations are payable, cannot be attacked for usury in the state where the land mortgaged is situated."

The facts in that case, and the facts in the instant case, are very similar, though there was very much more room for the contention that the Eastern Building and Loan Association of Syracuse had become domiciled in the State of Tennessee, than there is in the instant case to insist that the appellant association had become domiciled in the State of Mississippi.

Section 1 of Article 15 of the by-laws of the Eastern Building and Loan Association of Syracuse, provided that "Each shareholder for each share named in their certificate shall be entitled to a loan of one hundred dollars from the association, provided they shall first make application for such loan upon a blank furnished by the association for that purpose if the condition of the loan fund in the treasury shall warrant it."

As before stated, Article 13, of the Articles of Association of the appellant association, provides

that "any member can borrow on his shares ninety per cent. of the withdrawal value thereof," &c., subject to certain conditions named therein; this however, applies to loans on shares which already have a value, and where no mortgage on land is given.

In other words, the right to borrow is a right incident to membership in either of these associations, though there are some minor differences in the by-laws of the one and the articles of Association of the other association, as to the amount which can be borrowed and the conditions upon which the loan is to be made to the members of said associations.

In the Bedford case Mr. Justice McKenna put the whole case in the following question, "Did the subscription to the stock of the association, its issuance, and the application for a loan in pursuance of it, constitute a contract which was inviolable by the state legislature?" He expressed the opinion of the Court in an answer, which was almost as brief, as follows: "We think the answer should be in the affirmative. By his subscription to stock of the association Bedford became a member of the association, bound to the performance of what its by-laws and charter required of him, and entitled to exact the performance of what the by-laws and charter required of the association. Each acquired a right to what the other promised, and there were all the elements of a contract."

So, here, we insist that Brahan's subscription to the stock of the appellant association, its issuance, his application for a loan, the advance granted thereon, the execution of the bond to evidence the loan and of the assignment of shares, and of the mortgage to secure the same, constitute a contract between the parties hereto which the legislature of the State of Mississippi could not impair.

Neither could it be impaired by any judicial construction by the Supreme Court of the State of any statute passed subsequent to the execution of the contract, nor by the announcement by that court of any public policy of the state in reference to similar contracts, which announcement did not antedate the contract.

We understand the rule to be that Section 10 of Article 1 of the Constitution of the United States, was not intended to embrace judicial decisions under the ward "law," and the ordinary acceptation of that term does not embrace judicial decisions, though in the case of Pine Grove Township v. Talcott, 86 U. S. Reports, L. Ed., 22 p. 233, Mr. Justice Swayne, delivering the opinion of the Court, used the following language: "The national constitution forbids the states to pass laws impairing the obligation of contracts. In cases properly brought before us that end can be accomplished unwarrantably no more by judicial decisions than by legislation. Were we to yield in cases like this to the authority of the decisions of the Courts of the respective States, we should abdicate the performance of one of the most important duties with which this tribunal is charged and disappoint the wise and salutary policy of the framers of the constitution in providing for the creation of an independent federal judiciary. The exercise of our appellate jurisdiction would be but a solemn mockery."

"But the prohibition is directed against the legislative action of the State (whether by the legislature or by a constitutional convention) and not against the determinations of its judicial department. The obligation of the contract must have been impaired by some law, that is, some constitutional provision or statute. A judgment of the Supreme Court of a state will not be reviewed

by the Supreme Court of the United States, on a writ of error, on the ground that the obligation of a contract has been impaired, *unless some legislative act or constitutional provision has been sustained by the judgment.*" Black's Constitutional Law, Second Edition, page 605-606.

"JUDICIAL DECISIONS.—While ordinarily, judicial decisions are not laws of the state, as that term is used in the constitutional provision under consideration, yet judicial decisions construing constitutional provisions, statutes, and ordinances are, in a practical sense, a part thereof, and a change of decision may have all the practical effect of the adoption of a new constitutional provision, statute, or ordinance; and if the last construction has the effect of impairing the obligation of a contract entered into while the prior decision was regarded as having established the law, the last decision must be disregarded in adjudicating the rights of the parties" (Amer. & Eng. Encyc. of Law, 2nd Ed., Vol. 15, p. 1046).

Turning to the opinion of the Court in this case, it will be seen that the Court refers to other cases which will have to be examined in order to determine exactly what law was applied to the contract involved in the case before the Court. The first sentence found in the opinion is as follows: "This case is controlled on the direct appeal as to the loan made under the Code of 1892 (meaning the loan made on the 3rd day of September, 1894) by the cases of National B. & L. Association, &c.—this same appellant—vs. Wilson, 78 Miss., 993; Shannon vs. Georgia State B. & L. Association, 78 Miss., p. 955, and the authorities there cited" (Transcript, p. 104).

"On the cross appeal, as to the loan made under the Act of 1886 (meaning the loan made on the 4th day of June, 1892), the case of this same appellant

v. Pinkston, controls (79 Miss., p. 468)" (Transcript, p. 106).

In this connection it should be remembered that the Annotated Code of Mississippi took effect on the first day of November, 1892 (See Code, Sec. 2).

Turning to the Shannon case, we find the following announcement by the Supreme Court of Mississippi: "The premium in this case was fixed and the contract was, therefore, usurious. See the case of Sokoloski and Crofton, 77 Miss., 155-166."

Turning to the Sokoloski case, we find the rule announced in the syllabus as follows: "Ten per centum being the maximum rate of lawful interest, the contract of a non-resident building and loan association stipulating for six per centum per annum as interest, and six per centum to be paid per month as fixed premiums upon a loan, is usurious."

The closing sentence of the opinion of the Supreme Court of Mississippi in that case is as follows: "The contract for the taking of six per centum premium and six per cent. interest is opposed to our public policy, and is usurious and void."

Volume 77 of the Mississippi Reports embraces the "Report of cases decided by the Supreme Court of Mississippi at the March Term, 1899, December Special Term, 1899, and March Term, 1900," as will appear by reference to the title page thereof, and to be more specific, the Sokoloski case was decided on the 15th day of May, 1899, which only lacked a few days of being seven years after the relation between the parties hereto and their rights under the contracts in controversy became fixed.

In this connection we beg leave to suggest to the Court that while there are two loans, one made in 1892 and one made in 1894, involved in the controversy in this case, Brahan's right to demand a loan of the appellant association, which, as before

stated, is incident to his membership in the same, bears date from the date of his membership in the association in May, 1892, and the stock issued to him at that time forms the predicate of both loans.

The first loan was made in May, 1892, and the second loan was made in August, 1894. Ans. 24 (by Wm. Gibson) (Transcript, p. 42).

Chapter 13 of the Acts of 1886, hereinbefore copied in full, was the statute in reference to the rate of interest when the first loan was made, but, as before stated, the Code of 1892 (known as the Annotated Code of Mississippi) went into effect on the 1st day of November, 1892, and Section 2348 of that Code (also hereinbefore copied in full) was the statute of the State of Mississippi in existence in reference to the "legal rate of interest" in that State when the second loan was made.

We insist, however, that the laws of New York, and not the laws of Mississippi, whether found in the Acts of '86 or the Code of 1892, determine the rights of the parties to this controversy; but if mistaken in this, it is certainly true that the rule announced in the Sokoloski case, nearly seven years after Brahan became a member of the appellant association, cannot be applied to the contracts in question without impairing the obligation of the same, and denying "full faith and credit to the public acts, records and judicial proceedings, of the State of New York."

It will be seen, by reference to the Sokoloski case, that no previous opinion of the Supreme Court of Mississippi is referred to therein as sustaining the doctrine therein announced; and it will further be seen, by reference to the Crofton case, referred to in the opinion of the Court in the instant case in connection with the Sokoloski case, that the Sokoloski case is referred to to support the doctrine an-

nounced therein. In the latter case Whitfield, Justice, delivering the opinion of the Court, says, "as to the usury, we have held in Sokoloski vs. New South *Building and Loan Association* * * * that a fixed premium of six per centum, together with a further charge of six per centum as interest, *eo nomine,* makes the *building and loan contract usurious."*

These opinions, as appears by the opinion in the Crofton case, were delivered on the same day, and they announced a new doctrine in reference to building and loan contracts in the State of Mississippi, and, as we shall undertake to show, the rule announced therein was in direct conflict with previous adjudications of the same Court upon the same subject.

In the case of Sullivan vs. B. & L. Association, decided in 1892 and reported in 70 Miss., p. 99, the question arose for the first time in Mississippi, whether the payment of a premium by a borrowing member from a building and loan association made the contract usurious. In that case Sullivan bid off a loan of $1,000.00 at a premium of forty per cent. and executed his obligation therefor, and received $600.00, "being the face value of the loan less the premium of forty per cent."

He subsequently filed a bill in the Chancery Court of Hinds County, Mississippi, alleging that the contract was usurious, and that he was entitled to recover "back from the association all amounts paid by him to it in excess of $600.00 and to have his note and trust deed surrendered and cancelled."

Woods, Justice, delivering the opinion of the Court, said:

"The questions involved have been so often and so exhaustively considered by Courts of last resort that it appears like beating threshed straw to do more than announce the views of this Court.

1. The premium of $400.00 represents the discount agreed to be made upon the future and uncertain dividends of appellant's shares of stock in the association. It is the difference, estimated by the association and its borrowing member, between the par value of the member's shares of stock and their present real value. It is the bonus which appellant might lawfully agree to pay for a present advancement in cash of a sum certain for the virtual transfer to the association of his shares of stock, which, in the final winding up of its affairs, may realize the sum actually received by the member, together with the premium, bid, or which may not. It is not a deduction of money belonging to him, for, at the time of the transaction, appellant had only a future interest in the association's earnings and accumulations. It is not a pre-payment of that amount by appellant, for the premium of $400.00 will be paid, it at all, when the $600.00 advanced is repaid.

We are of opinion, therefore, that the premium does not render the contract usurious."

It was contended in that case that the Act of 1886, allowed the B. & L. Association to charge interest upon the premium of $400.00, to which contention the Court replied as follows:

"And this brings us, in an orderly way, to the contention of appellee's counsel that such legislation is found in the acts of our legislature, 1886, p. 35. We cannot agree with the learned counsel. The utmost that this remarkable act can be said to do is to authorize building and loan associations to stipulate for and demand a greater rate of interest than ten per cent. per annum 'for any money advanced or loaned' by it. Legislative tenderness for such corporations has not yet gone, as counsel suppose, to the violent extreme of permitting even

these favored associations to stipulate for and demand any extortionate rate of interest which its greed and its borrowing member's necessity might fasten upon the unhappy and necessitous creature, on any imaginary sum of mythical money which they agreed to name, even though such sum was never seen by the member, and even though such sum had no existence in fact, at the time of the transaction. For the present, the borrowing member can only be constrained to pay extortionate and usurious interest upon 'money advanced or loaned' —money which he actually received and had, and not upon forty per cent. of all his shares of stock in the association, which he has virtually transferred to the association, under the name and in the form of a premium."

It is true that the Building and Loan Association in that case was a domestic association, but it is perfectly clear from the opinion as a whole that the Court did not regard that fact as in any wise controlling the decision of the case. The opening paragraph of the opinion, "That the questions involved have been so often and so exhaustively considered by courts of last resort," etc., shows conclusively that the Court was treating the questions involved with reference to well known rules of law applicable thereto and not with reference to any particular State statute.

The other paragraph of the opinion above quoted, "and this brings us in an orderly way to the contention of appellee's counsel that such legislation is found in the acts of our legislature, 1886, p. 35." (Chapter 13, hereinbefore quoted at length), shows that up to that time the Court had not considered the effect of the Act of 1886, and in speaking of that Act, the Court said, "*The utmost that this remarkable act can be said to do is to authorize building and loan associations to stipulate for and de-*

mand a greater rate of interest than ten per cent. per annum for any money advanced or loaned."

It will be seen that the Court treated this act in that opinion as applying to building and loan associations generally, because there is not a word in the opinion about the application of the act to domestic building and loan associations as distinguished from foreign building and loan associations. The act itself makes no such distinction (though as we shall subsequently show the Supreme Court of Mississippi in the Pinkston case, referred to and relied upon as authority for the instant case, held that the act applied only to domestic building and loan associations) and if the act had been limited in terms, or in the opinion of the Court, to domestic building and loan associations, there would have been no sort of occasion to have referred to the same as *"this remarkable act," or to* have spoken of the "legislative tenderness for such corporations," for certainly such consideration for domestic building and loan association found in quite a number of acts of the various States could neither be considered "remarkable" nor referred to as exhibiting any undue amount of legislative tenderness.

In the case of Goodman v. Loan Association, decided in 1893, and reported in 71 Miss. Rep., on pages 234, 325, Chief Justice Campbell, delivering the opinion of the Court, said:

"We reject the notion that because no statute of this State expressly authorizes the creation of building and loan associations, therefore, none could be formed under the general law for incorporations. Under the general law, any corporation not prohibited could be formed with any customary and appropriate powers not inconsistent with law. The vital principle of such associations, as known to us, is compounding monthly receipts,

whereby to produce astounding results, for the mutual benefit of all concerned, and what is called a fine (merely an agreed sum as liquidated damages) is imposed for every default in payment, as a spur to prompt payment, so as not to derange the process of compounding, which must fail if there is want of payment as agreed and failure of which would cause failure of the scheme. *We see nothing wrong in members of full age and compos mentis mutually binding themselves to so beautiful a scheme for reciprocal advantage, and being held to the performance of what they have agreed.*"

Manifestly, this opinion was not based upon a State statute, because it is expressly stated therein that "no statute of this State expressly authorized the creation of building and loan associations"; the Court further says that "any corporation not prohibited could be formed with any customary and appropriate powers (under the general law) not inconsistent with law," and yet we see from that portion of the opinion above quoted the Supreme Court of Mississippi in 1893, understood the "vital principles of such associations" • • • and saw "nothing wrong in members of full age and *compos mentis*" becoming members thereof and being held to the performance of their contracts.

That we have rightly construed the early decisions of this Court is evidenced by the fact that Endlich on Building Associations, in collating and stating the views of the different State Courts on the subject of loans or advancements to members, classes the State of Mississippi among the States upholding the validity of such loans against the charge of usury (See Endlich, 2nd Edition, page 313).

The same view of the earlier Mississippi decisions is taken by Thornton & Blackledge on Building and Loan Associations, Section 248, and by

Thompson (2nd Ed.), Section 192. Hence every text writer supports our contention that the Sokoloski decision represents a change in the jurisprudence of the State of Mississippi.

In the case of Manship, *et al.*, vs. New South Building and Loan Association, *et al.*, reported in 110 Fed. Rep., page 845, which was a case tried before the Circuit Court of the United States for the Southern District of Mississippi in 1901, Judge Niles recognized the fact that there had been a marked departure from the previous decisions of the Supreme Court of Mississippi in the Sokoloski case. After quoting the opinion delivered by Chief Justice Campbell in the Goodman case, the Court said: "With this statement of the Court I fully concur. Liberty to contract is one of the essential elements of freedom and one of the most valuable rights incident to our institutions, and it is very difficult for me to see any reason in law or morals why a party desiring to become a member of a building and loan association may not do so, and if he desires that a part of his contributions shall be credited upon the amount borrowed by him, and that a part shall go to swell the loan fund of the association to be loaned to his fellow members of the association, and in this way swell the profits and increase the value of his stock therein and thereby hasten its maturity, I see no reason why he should not be permitted to do so and why his contract might not be enforced according to his agreement; and, furthermore, I fail to understand what right the Court which may be called upon to enforce such contracts has to appropriate his stock payments or his payments of premiums in any other way than he agreed that they should be appropriated."

While recognizing and following the rule announced in the Goodman case, Judge Niles, in the

same opinion, referring to the Sokoloski case, declined to follow it, assigning as a reason therefor that "The Supreme Court of Mississippi followed the misleading statements of the law, found in Endlich on Building Associations, in reference to the effect of "fixed premiums" upon building and loan contracts, in Sokoloski v. Association, and that doctrine, though there is no similar statute to the one quoted (by Endlich) from Ohio in this State, seems now to be thoroughly established in Mississippi; *but I decline to follow the Sokoloski case*, and other cases following it, in this particular, because, in my judgment, the Court in that case was misled by the statement of an author who did not find any support for the doctrine announced by him in the authority to which he referred."

Not only is the decision of the Supreme Court of Mississippi in the instant case a complete departure from the earlier decisions of the same Court on the question of usury and the construction of the statute of 1886, but it also ignores the decision of that Court rendered in 1893 in the case of Loan Association vs. Shields, reported in 71 Miss. In that case, a borrowing member of the association withdrew from the same and made a voluntary settlement therewith, just as Brahan did with the appellant association and afterward brough suit against the association, just as was done in this case, to recover on account of the alleged usurious character of the contract.

On this state of case, Woods, Justice, delivered the opinion of the Court, which we quote in full:

"As a matter of fact, the appellee paid less than ten per cent. per annum interest on the amount of money actually advanced or loaned to him. His contract, most unfavorably construed for appellant, required the payment of lawful interest on the amount of his bid; the record finally shows that

he paid less than lawful interest on the sum really received by him. It is difficult to conjecture where any claim of usury can be tenably planted.

But independently of this, the appellee, on repaying his loan and withdrawing from the association, voluntarily made the settlement plainly shown in the record, and this he did with full knowledge of all the facts. In this voluntary settlement he made no mistake of fact; he has received subsequent enlightment of law, as he now supposes. In this voluntary settlement made with his eyes open, he received seventy-two and one-hundredths of the premiums bid by him, which was returned as unearned, and he received his share of all the profits made by the association, during his membership and while enjoying the money loaned him, and these profits embraced his ratable part of all interest paid by all borrowing members, himself and others. In that settlement he took as his own his part of all interest now supposed to have been usurious and yet holds it.

A peremptory instruction for defendant should have been given."

We insist that these earlier decisions of the Supreme Court of Mississippi, and especially the decision in the case of Sullivan vs. B. & L. Association, in which the statute of 1886 was first considered by the Courts of that State, "are in a practical sense a part thereof," and the statutes quoted in the Shannon and Wilson cases reported in 78 Miss., upon which the decision in the instant case relies as controlling the rights of the parties hereto, as construed by the Supreme Court of Mississippi in those cases and the case in hand, inevitably impair the obligation of the contract made between the parties hereto.

The Supreme Court of Mississippi, by its decision, deprived the appellant association of its "Liberty" and "Property without due process of law," and also denied it "the equal protection of the laws," contrary to the provisions of the fourteenth amendment.

"This clause (of the Fourteenth Amendment) operates upon all agencies by which State law is made and enforced, all departments of State government, legislative, executive, *judicial,* and all subordinate agencies.

The clause of equality before the law protects not only natural persons, but also those artificial persons called corporations, it regarding them as persons under it.

What is the practical meaning of the clause? Its words, "equal protection of the laws," in themselves are a good general definition, especially when we come to the task of applying them to a particular case. None but general definitions, which are innumerable in varying phrase, can be given. *We can only apply it to cases as they come.* What is now equal protection would not have been so heretofore; what is now such may not be such in future. Times, society, and their wants change. Take the police power of a State. What would infract the amendment now, may not do so some years hence. The needs of government change with changing conditions. Wonderful is the great number of cases, not only in the State, but in Federal Courts, involving this amendment. Everybody who is in stress these days is appealing to the Federal Courts for protection; and as said in Holden v. Hardy by the Supreme Court, these cases 'demonstrate that in passing on the validity of State legislation un-

der it, this Court has not failed to recognize the fact that the law is, to a certain extent, a progressive science!' "

Brannon on the Fourteenth Amendment, page 319-320.

Justice Field in the opinion in Barbier v. Connolly said the Fourteenth Amendment, in declaring that no State "shall deprive any person of life, liberty or property without due process of law, nor deny to any person equal protection of the laws," undoubtedly "meant not only that there should be no arbitrary spoliation of property, but that equal protection and security should be given to all alike under like circumstances, in the enjoyment of their personal and civil rights * * * that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuit by others under like circumstances."

Brannon on the Fourteenth Amendment, page 315, under the title of "Equal Protection of the Law," says, "We have seen how far-reaching are the clauses of Section 1 of the Fourteenth Amendment relative to the rights, privileges and immunities of citizens of the United States, and the prohibition against all state action depriving persons of life, liberty or property without due process of law; but far reaching and wide as are those clauses, the framers of the amendment were not content with them, but added another clause providing that no state shall 'deny to any person within its jurisdiction the equal protection of the laws.' The authors of the amendment inserted this clause as a safety clause in order to guarantee rights which might not fall under the protection of the antecedent clauses, and under them secure rights given by the laws.' What does this clause mean? It is difficult to say; nor is it safe to say. As the Su-

preme Court has said with reference to other clauses it is impracticable, not desirable, and dangerous to attempt in advance any inflexible, unchangeable, cast-iron rule or application. *Each case must stand on its own features and merits as it arises in the course of time and in changing conditions and necessities.*

"Antecedent to the Fourteenth Amendment, the Supreme Court of Tennessee used language seeming to be prophetic of its coming and vindicative of its policy in Wally's Heirs v. Kennedy (2nd. Yerg. Tenn., 554). The rights of every individual must stand or fall by the same rule of law that governs every other member of the body politic or land under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by according remedies leading to similar circumstances is unconstitutional and void."

"PROPERTY" PROTECTED BY THE FOURTEENTH AMENDMENT.

The term "property" as used in the Fourteenth Amendment has been defined to be "anything in which the law allows ownership by man is property under this amendment. It may be real, personal or mixed; it may be corporeal or incorporeal * * * in short anything capable of beneficial ownership."

Brannon on the Fourteenth Amendment p. 118.

"LIBERTY" PROTECTED BY THE FOURTEENTH AMENDMENT.

The term "liberty" as used in the Fourteenth Amendment, while not easily defined is an exceedingly comprehensive term, and it will doubtless be-

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come more comprehensive and all-embracing as the country grows in wealth, and population, and the ever-increasing ingenuity and enterprise of our people find new avenues for their operation. It has been defined to mean "exemption or immunity from unlawful imprisonment or detention of the body, freedom to go and come on lawful business or pleasure commonly called the right of locomotion; the right to acquire, hold and convey property; *the right to make contracts and to labor in any calling to earn a living*, to marry and have a family."

"Vain would be the pursuit of happiness if the right of contract necessary to secure the bread of life and raiment and home be taken away. Scarcely any of the great cardinal rights are more universally recognized and vindicated under our system, indeed, under all civilized governments, than this right of contract."

Brannon on the Fourteenth Amendment, p. 111.

In the case of Algeyer v. State of Louisiana, 165 U. S. Rep., this Court held that:

"The right of a citizen of a state to send a notification by mail to an insurance company in another state, which is not authorized to do business in the state where he resides, in order that insurance previously provided for by a valid contract made and to be performed outside the state might attach to the property specified in a shipment mentioned in the notice, although the property was then within the state, cannot be prohibited by a state statute, since that right is included in the 'liberty' of the citizen which is protected against deprivation without due process of law.

The privilege of pursuing an ordinary calling or trade, and of acquiring, holding and selling

property, embraces the right to make all proper contracts in relation thereto."

To paraphrase this statement of the law upholding the "liberty" of a citizen of one state to carry out his contracts entered into in another state and apply the same to the instant case, we would say that the right of F. V. Brahan to become a member of the appellant association, to borrow money therefrom, to secure its payment, and to voluntarily pay the same, and the correlative right of the defendant association to accept Brahan as a member, to lend him money, to receive payment voluntarily made by him, and to *keep it* after it was so paid, are rights which cannot be denied without invading the liberty of contract possessed by each of these parties, depriving the appellant of its "property without due process of law," and denying appellant the "equal protection of the laws."

The instant case is fully as strong on the vital facts connected with the contract in question, as the Algeyer case, and has this advantage on the legal questions involved in favor of plaintiff in error, that there was no statute of the State of Mississippi, either at the time that the contract between the parties was made, or at the time of the settlement of the same, which prohibited the doing of anything which was done by either of the parties in the State of Mississippi. Whereas, in the Algeyer case, the statute, Number 66, of Louisiana laws, of 1894, provided that "any person, firm or corporation who shall fill up, sign or issue in this State any certificate of insurance under an open marine policy, or who in any manner whatever does any act in this State to effect for himself or for another insurance on property then in this State in any marine insurance company which has not complied in all respects with the laws of this State shall be subject to a fine of $1,000.00 for each offense," etc.

We recognize the fact that the State of Mississippi had the power, if it had seen fit to exercise it, to name the terms upon which the appellant association should be allowed to do business in Mississippi, and that if appellant had seen fit to do business in the State in violation of such terms, with parties to whom it owed no contract obligation prior to the interposition of such terms, it could have claimed no protection under the constitutional provisions now insisted upon.

This rule of law forms the predicate of the decision in the recent case of Chattanooga National Building and Loan Association v. William H. Denson *et al.*, decided by this Court and reported in 189 U. S., 408, and has been recognized in all of the decisions of this Court on that subject; but it has no application here for the simple reason that there never has been a statute in the State of Mississippi which undertook to regulate the transaction of foreign building and loan associations with its members in that State.

Justice Calhoun, in the case of Building and Loan Association v. Pinkston, 79 Miss., used the following language: "At the date of the act (meaning the Act of 1886, hereinbefore quoted in full) no law of this State regulated foreign building and loan associations or prescribed any terms of their doing business here."

It is true that this expression is found in a dissenting opinion, but the dissenting opinion was rendered on other grounds, and there can be no dispute about the correctness of the above quoted statement. The only statute in the State in reference to this matter, which has been enacted since (save and except revenue statutes which throw no light on the matters in controversy) is that found in Section 2348 of the Annotated Code of 1892, regulating the rate of interest in that State. This

statute has hereinbefore been quoted in full, and by reference thereto it will be seen that *it does not undertake to prescribe any terms upon which foreign building and loan associations shall do business in the State of Mississippi.*

It is true that the last clause of Section 849 of the Code of 1892 provides, in reference to foreign corporations generally, that "such foreign corporations shall not do or commit any act in this State contrary to the laws or policy thereof, and shall not be allowed to recover on any contract made in violation of law or public policy."

This provision of the statute is quoted in the opinion of the Supreme Court of Mississippi in the instant case, but by reference thereto it will be seen that there was no application made of the same to the facts of this case by the Court. The appellant association was not seeking to recover anything on any contract of any kind, whether made in violation of the laws of the State of Mississippi, its public policy or otherwise, but was seeking to defend an effort to recover from it by the defendant in error upon the suit instituted by him against said association.

There is not a syllable of proof in the record in this cause that the appellant association had done or committed any act in the State of Mississippi contrary to the laws of that State, and the only way we can account for the effort of the Supreme Court of the State to apply Section 849 of the Code of 1892 to the instant case is found in the curious but manifest error into which the Court fell in supposing that the Shannon case, previously decided by the Court, was a controversy between Shannon and the appellant association, and applying the facts in the Shannon case to the instant case, when, as a matter of fact, the Shannon case involved a controversy between Shannon and the Georgia

State Building and Loan Association, and not the appellant association at all.

In the opinion in the instant case, Chief Justice Whitfield says "We desire in passing upon the merits of the case to say, for the satisfaction of learned counsel for appellant, that we have both in this case and in the case of *Shannon v. this same appellant,* and Wilson v. this same appellant, both reported in 78 Miss., carefully considered the opinion of Judge Hammond in 88 Fed. Rep., p. 7, and Judge McKenna in Bedford v. Eastern B. & L. Association" (Transcript, p. 106).

Turning to the Shannon case, reported in 78 Miss., on page 955, we see that "This was an action by the appellant, Chas. R. Shannon, for the recovery of usurious interest paid to the appellee, *the Georgia State Building and Loan Association*, and was begun by attachment against the defendant as a non-resident."

It will thus manifestly appear that the Supreme Court of Mississippi, in the instant case, was laboring under the impression that the Shannon case and the instant case involved a controversy with the same foreign building and loan association, and, laboring under this erroneous impression, the Supreme Court of Mississippi sought to apply in the instant case a statute of that state pertinent to the facts in the Shannon case, but not pertinent to the instant case.

The facts in these two cases, as disclosed by the reports thereof, are as distinct and separate as the associations themselves. In the opinion in the instant case, the Court, relying upon the Shannon case, and erroneously supposing that the same facts applied in the present case, and applying the Shannon case to this case as a precedent, used the following language: "We put the decision in Shannon's case as follows: 'The chief point of contention is, whether this is a Georgia or a Mississippi contract.

It is true the notes were payable in Georgia, but the mortgage was on land in Mississippi, and the debtor lived in Mississippi, where alone the mortgage could have been enforced. *All the payments made through a series of years were actually made in Mississippi instead of Georgia to the local treasurer here.* This foreign corporation had the power to organize local boards throughout Georgia and other states. *It did organize a local board, thoroughly officered at Ellisville in this State.* It is obvious that this foreign corporation has thus *localized* its Mississippi business within the State of Mississippi." * * * "The contract is a Mississippi contract according to the *real facts and the real intention of the parties.* Courts look through all disguises to the real case made by the actual facts (Transcript, p. 108)."

There is not a hint in this record that the appellant association ever organized *a local board at Ellisville or anywhere else in the State of Mississippi*, and, as a matter of fact, instead of "all the payments through a series of years" being made in Mississippi to the local treasurer here, the larger portion of each of the loans made to the defendant in error was re-paid in New York (Transcript, Ans. 26, p. 50).

The reference to the Act of 1890, page 10, and the effort to apply the same to the instant case, must have grown out of the same misconception which led to the reference to Section 849 of the Code of 1892. The Act of 890 is found in Chapter 2, and is styled "An Act to amend the Revenue Laws" and its whole purpose and scope is to provide for revenue. On page 10 of said Act, we find that "Each building and loan association incorporated by any foreign country or other state of the Union * * * which shall *establish agencies or branches* within the state, shall be liable to a separate tax on *each branch office or agency*, and

each of said agencies or places of doing business or collecting dues shall be considered *for the purpose of taxation* as a separate and distinct building and loan association and shall pay the tax required of the building and loan association by the act to which this is an amendment."

As there was no branch office or agency established by the appellant association in this state, so far as the record discloses, there is no room for the application of this statute to the instant case.

It is true that the record discloses the fact that the appellant association had an agent in the city of Meridian, with limited duties and powers, but there is no statute in the State of Mississippi taxing *agents* of foreign building and loan associations, or in the remotest way referring to *agents* of foreign building and loan associations and prescribing what they may or may not do in that state. There is a vast distinction between an "agency" or "branch office" and an agent, and this distinction is thoroughly recognized in the revenue laws to which the Act of 1890 is an amendment, and of which it forms a part.

Section 3382 of the Code of 892 of the revenue laws of that state, providing for privilege taxes, to which the Act of 890 is an amendment, provides that the following privileges, among others, shall be paid: "On *each agency* for sewing machines—$50.00: On *each agent* for sewing machines of each company—$10.00."

We think that it is perfectly manifest that the statutes above referred to have no sort of place in the proper construction of the contracts in question, even if the same had been entered into subsequent to their enactment, and that, as construed by the Supreme Court of the state in the instant case, and those referred to as authority for the conclusions reached therein, they violate the constitutional guarantees upon which

appellant relies; but, if mistaken in this, certainly no act of the legislature of the State of Mississippi passed subsequent to the time when the defendant in error became a member of the appellant association can effect the rights of the parties hereto. Let it be remembered that every essential act and fact connected with the transaction between the parties hereto took place and culminated in the City of New York. The appellee's application for membership was not a matter of right to be granted simply for the asking, and when his application was mailed in the City of Meridian he did not, by this act, become a member of the association, but it was the acceptance of his application by the officers of the association at the City of New York and the issuance of his stock which made him a member of the association.

Under provisions of the Articles of Association and the rule announced in the Bedford case, he then became entitled to demand an advance upon his shares of the stock upon the conditions named and provided by said association. This, as we have already seen, was a vested right of which he could not be deprived, and the moment the advance was made the association became vested with the correlative right to receive payment of the same upon the terms upon which it was made. In pursuance of the right which defendant in error had under his contract, he subsequently made a settlement of each of the advances made to him by the appellant association. Each settlement was made voluntarily and before the stock in either case had matured. At the time of the settlement Brahan was given credit, in the withdrawal value of his shares, for the premiums, interest and dues paid prior thereto to the Agent of the Association at Meridian, Mississippi, which was but an insignificant part of each loan. The

larger portion of each advance was repaid in New York Exchange sent directly to the Appellant Association by Braham from Meridian, Mississippi.

Referring to the payment of the second loan, which was the same as that of the first, the witness Gibson in answer to Interrogatory 36, says:

"The second loan was re-paid at the office of the Association in the City of New York, on or about March 10, 1897, by applying the withdrawal value of twenty shares held by said Brahan, in part payment, and by applying the proceeds of the draft drawn by the First National Bank of Meridian, on the National Park Bank, of New York, amounting to $1,473.93, and the amount of which draft was paid by the said bank to said Association at the City of New York. This re-payment was made strictly in accordance with the Articles of the Association and under the terms of the contract contained in the Bond and Mortgage and assignment of shares executed by Brahan, and on this re-payment of the loan the said Brahan received the proportionate share of the alleged usurious profits, to which he was entitled under the Articles of the Association by having the same, then amounting to $70.70, applied in making up the withdrawal value of his twenty shares, which value was then applied in part payment of the loan" (Transcript, 56).

Under the contract between the parties, as shown by the record, it was the maturity of Brahan's shares of stock in the appellant association which was to work the payment or cancellation of his indebtedness thereto, and for the payment of the same the stock was required to be surrendered to the association. In neither of the cases was anything like a sufficient sum paid to the agent of the Association at Meridian, Mississippi, to approximate the maturity of the shares; so that, as a

matter of fact, it was the application of the proceeds in New York Exchange at New York, added to the application of the withdrawal value of the shares at New York, to the payment of the advance or indebtedness in each case which finally worked out the settlement between the parties hereto. Upon the settlement thus made all the relations between the parties hereto immediately ceased and the money thus paid became the property of the appellant association. In accepting the same it exercised a right which it had under contract between the parties, and it cannot now be deprived thereof without impairing the obligation of its contract with the defendant in error, depriving it of its liberty to contract and its property without due process of law, and also of the equal protection of the law, guaranteed by the Constitution of the United States.

This brings us to the consideration of the Pinkston case referred to in the opinion of the Supreme Court of Mississippi, as controlling the instant case upon cross appeal. In reference thereto the Supreme Court of Mississippi in its opinion says:

"On the cross appeal as to the loan made under the Act of 1886, the case of this same appellant vs. Pinkston, controls, 79 Miss. The judgment on the cross appeal is therefore reversed and the case as to that loan remanded to be proceeded with in accordance with the opinion this day delivered in the National Mutual Building & Loan Association vs. Pinkston (Transcript 237)."

Turning to the Pinkston case, it will be seen that that case turned upon the construction of the Act of 1886, hereinbefore cited in full. It will further be seen that though there is not a hint in the statute, which distinguishes domestic from foreign Building and Loan Associations, and though the Supreme Court of Mississippi in the case of Sullivan v. B. & L. Assn., had treated the

statute as applying alike to foreign and domestic associations, yet a divided Court in the Pinkston case held that the statute applied only to domestic Building and Loan Associations. It is needless for us to suggest that this new construction of the statute, as applied to the contracts in question, which were made long prior to the decision in the Pinkston case, is within the prohibition of the contract clause of the Constitution of the United States.

In this connection, we beg leave to call the attention of the Court to the fact that the opinion delivered by Judge Woods in the case of Sullivan vs. Building and Loan Association, was not as much as referred to. We further call the Court's attention to the dissenting opinion delivered by Calhoun, Justice, in the Pinkston case, construing the Act of 1886:

"The question now for answer is, whether non-resident building and loan associations are included or excluded from the exceptions made by Sec. 1. My view is * * * that such associations are included in the exception. It is incontrovertible that, if we had to deal only with the title of the Act and Sec. 1 of the Act, all building and loan associations would be included, because then it would be a general Act pure and simple, applying to all persons and corporations, whether foreign or domestic expressly excepted in such associations. There would be no difference of opinion as to this, because in that case the scope would be too plain to require interpretation."

After commenting upon the views of the majority of the Court further on in the opinion, Judge Calhoun says:

"Five days after this Act was passed in a general statute, the same Legislature imposed a privilege tax on Building & Loan Associations" (Laws, 1886,

p. 20). "This applies to foreign as well as domestic corporations, of course. How then can we limit the other Act. *It hardly comports with the magnanimity to be ascribed to the Legislature to suppose that it meant to dig a pitfall to entrap the foreign companies into pouring their money into Mississippi to their own ruin. When our Legislature meant to confine itself to domestic associations it distinctly said so, as in Sec. 2348 of the Code of 1892, and this is a pregnant fact in the construction of the Act in hand.*"

The Court will see that the Pinkston case is a complete departure from the principles announced in the Sullivan case, and in such cases, the true rule is, to give to the change of judicial construction or opinion in respect to a certain class of contracts the same effect, as to its operation on then existing contracts, that would be given to a legislative amendment; that is to say, to make it prospective but not retroactive (Douglas vs. County of Pike, 101 U. S., 677). The failure to do this, and the effort on the part of the Supreme Court of the State of Mississippi, to apply this new construction of the statutes of Mississippi, announced in the Pinkston case, to the contract in question, which antedated the decision, falls within the prohibition of the contract clause of the Constitution of the United States and results in depriving the Appellant Association of its property without due process of law and denies to it the equal protection of the laws.

> "*Any attempt by the Courts of Mississippi to so apply the statutes of that State to the contract in question under the facts as here disclosed, as to hold that such contract is usurious under the Mississippi statute, is an attempt to evade that provision of the 14th amendment to the U. S. Constitution, which grants to the parties liberty of contract.*"

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The Judgment of the Supreme Court of Mississippi should be reversed.

Having, as we insist, shown that the federal questions involved in the case were properly presented in due time; that they were necessarily involved in the decision of the Supreme Court of Mississippi and were decided adversely to the plaintiff in error; that there was no independent ground sufficiently broad upon which the decision could be rested; that the Federal questions raised were meritorious and controlling, we now desire briefly, to refer to the facts of the case in order to show the absolute want of merit in the suit of the defendant in error, and that the judgment of the Supreme Court of the State of Mississippi should be reversed.

It will be seen by reference to the decision in the instant case, and all of the cases referred to in it, as controlling, that the whole controversy turned in the opinion of the Supreme Court of Mississippi upon the situs of the contract. The Supreme Court referring thereto, uses the following language:

"The contract is a Mississippi contract according to the real facts and real intention of the parties. Courts look through all disguises to the real case made by the actual facts" (Transcript, 108).

"When all there is in a case like this to show that the intention was to perform the contract in a foreign State is a mere specious paper recital in the notes, and over against this, and contrary to this, are all the other facts in the case, and the whole course of dealing between the parties, it would be an abdication of common sense on the part of any Court to find the real intention of the parties in the paper recital instead of in the real facts of the case."

The foregoing is quoted by the Court from the Shannon case, but it is adopted in the instant case

and made the basis of the opinion of the Court as hereinbefore explained, under a mistaken conception of the facts. Looking first to the paper recitals in this case, we find, as hereinbefore indicated, that it is unquestionably a New York contract. Looking to the provisions of the paper recitals alone, there could be no controversy on that proposition. The only ground upon which the decision of the Supreme Court of Mississippi could justly be raised, would be that these paper recitals were fraudulent in fact and not intended to convey the real intent of the parties to the contract. Over against this we beg to submit the following suggestions: This Association was organized in the City of New York and expected to do business, and did do business in a number of States. The most natural thing possible, from a business point of view, would have been a requirement that all of its contracts should be made payable in the same State, in order that there might be harmony and uniformity of construction of its contracts, and that the funds of the Association might be gathered together under the immediate control of the officers of the Association domiciled in New York.

The testimony in the case shows that from the outset all of the contracts were made payable in New York, long before any advances were made to members in the State of Mississippi. The contracts of the Association are shown to be uniform, regardless of the State in which advances are made to members, and all this had become a custom and a rule of doing business before the State of Mississippi was thought of in connection with the business of Association. As a matter of fact, at the time these contracts were made, as hereinbefore shown, the State of Mississippi was classed by all of the authorities on Building & Loan Associations as among the States where the Building and Loan con-

tract would be enforced according to the terms thereof, so that there could not have been any possible reason for resorting to any subterfuge in reference to contracts between members of the Association in the State of Mississippi. Not only is that true but the record in this case shows that F. V. Brahan was a practicing lawyer, and we may add, a lawyer of ability, as will appear by declaration filed in the case prepared by himself and signed "F. V. Brahan, *per se*." Not only is this true, but the whole course of dealings between the parties shows that Brahan thoroughly understood the contract, and neither desired nor needed any one to look after his interest in the matter. His letter to the Association, written in 1893, found on page 78 of the Transcript shows that he voluntarily settled the first loan with the Association with the full understanding of all the facts and in strict accordance with the written terms thereof. This letter also shows his purpose to borrow again on the same shares of stock on the same terms, and as a matter of fact, he did procure another advance on the same shares of stock (except five, which he had withdrawn in the mean time) upon precisely the same terms, upon which he had secured the first advance, and this loan was likewise voluntarily settled by him in strict accordance with the terms of the written contract, and that with the full knowledge of all his rights and obligations in the premises. It is perfectly safe to say that it never would have occurred to Brahan in all the tide of time that his contract was anything, more or less, than it purported on its face to be, but for the decision by the Supreme Court of Mississippi in the Sokoloski case and other cases following that, from which, in the language of the opinion in Shields v. Association, "he obtained subsequent enlightenment of law, as he now supposes."

In the case of Luther Manship, *et al.* v. New South B. & L. Assn., herein before referred to, it was insisted, as it is here, that the contract in that case was a Mississippi and not a Louisiana contract. Referring to this contention, Judge Miles, delivering the opiniou of the Court, said:

"I now come to the consideration of whether the contract between the parties hereto is a Louisiana or a Mississippi contract. I think it clear that the contract is solvable in Louisiana, and it is to be governed by the laws in Louisiana. It is true that it is alleged in the bill in this cause that the contract was made payable in Louisiana for the fraudulent purpose of evading usury laws of the State of Mississippi, but this allegation is specifically denied, and not only does the proof fail to sustain it, but all the circumstances surrounding the transaction seem to me to reach the opposite conclusion. This building association was organized in Louisiana, and its principal place of business was New Orleans, Louisiana. It contemplated doing business in several States, in which the rates of interest vary in amount. The promoters of the organization and the officers of the same all lived in the State of Louisiana, and it was just as natural, as it was prudent, for Louisiana to be selected as the place where such contracts were to be paid. It would have been remarkable, and something out of the ordinary course of business affairs, if some one place of payment had not been fixed, and if that one place had been fixed elsewhere than where the home office was located and officers of the association resided. Sec. 5 of Article 3 of the by-laws of said association provides that 'all money due from members to the association or from it to the members shall be payable at the home office in New Orleans, La.'"

"The note given by Belmont P. Manship and Luther Manship on its face shows that it was pay-

able to the defendant association 'at their office in the City of New Orleans, La.' The deed of Trust given to secure the same recites the fact that said note is payable to the order of said New South Building and Loan Association at their office in the City of New Orleans, La. The subscription to stock signed by Belmont P. Manship provides that 'agents are not allowed to collect admission fees; same must be forwarded to the home office direct by the applicant, all other payments to be made to the home office.' "

"It is true that it was provided by Sec. 4, Article 8 of the by-laws of said association, that 'members may, if they so desire, make monthly payments on stock to the local treasurer, but such local treasurer shall be deemed to be the agent of the members and not of the association.' It is further true that the evidence in this case shows that all payments made on this debt were made at Jackson, Mississippi, to parties selected by the defendant association to collect and remit the same. I am unable to see how this proves that the contract is a Mississippi contract.

"To put themselves in an attitude to do business in competition with local building and loan associations, it was necessary to make some arrangement for collections and remittances, and the local arrangement so made was the simple outgrowth of the situation, and does not conflict with the general provisions of the contract that the same should be solvable in the State of Louisiana. There can be no doubt that the contract between the parties hereto would be enforced as written in the State of Louisiana (See American Homestead Company vs. Linigan, 46 La. An.; 15 Southern Rep., 370; 21 Southern Rep., 643). I believe it is admitted that the contract between the parties hereto would be enforced in Louisiana, and it being in my judgment, a Louisiana contract, it should be enforced elswhere.

"It is urged upon the Court that the Supreme Court of Mississippi is committed to the doctrine that contracts similar to this are Mississippi contracts, and that this Court should follow that Court. The case of Sokoloski vs. New South Building and L. Association is cited, and this Court is urged to follow the same. The question, in my judgment, is one of general jurisprudence and commercial law, in respect to which the decision of the State Court, however much it may be respected, is not binding upon this Court, and cannot be followed when this Court, in the exercise of an independent judgment, reaches a different conclusion.

"The contention that Federal Courts should follow State Courts generally grows out of the provisions of the judiciary act found in Revised Statutes of the United States, Sec. 721, which provides that: 'The laws of the several states, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the Courts of the United States in cases where they apply.'

"In Swift vs. Tyson, in 1842, the question involved was whether a pre-existing debt constituted such a valuable consideration as to make a transferee of commercial paper a holder for value. The Federal Court disregarded the decision of the Courts of last resort in the State of New York, in which the contract was made and became payable. Justice Story, in delivering the opinion of the Court, used the following language: 'In the ordinary use of language, it will hardly be contended that the decisions of the Courts constitute laws. The laws of a state are usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long established local customs having the force of laws. And we have not the slightest difficulty in holding that this

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section upon its true intendment and construction is strictly limited to local statutes and local usages of the character before stated, and does not extend to *contracts* and *other instruments of a commercial nature*, the true interpretation and effect whereof are to be sought not in the decisions of local tribunals, but in the general principles and doctrines of commercial jurisprudence." See also Oates vs. First National Bank, 110 United States, 239; Hudson R. Co. vs. Hading, 30 Fed. R., 513; Watson vs. Tarpley, 16th Howard, 57; Brooklyn City R. R. vs. National Bank, 102 U. S., 14; Bank of Edgefield vs. Farmers' Co. Op., 52 Fed., 98; 8th Wallace, 575.

The law of the place of performance of a contract is purely a commercial question, and the federal Courts have disregarded the State Courts on that question in the following cases: Hartford Fire Insurance Co. vs. C. M. & St. P. R. W., 70 Fed. R,. 20; 94 Fed. Rep., 575, referred to hereafter in this opinion; Brewer vs. The Association, 86 Fed. Rep., 784, and Building and Loan Association of Dakota vs. Logan, 14 C. C. A., 133.

I don't think it can be contended that the ruling of the Supreme Court of this state (Mississippi) in the Sokoloski case that a fixed premium rendered the contract usurious, or in the Shannon case, that the contract in that case was a Mississippi contract, are founded upon any "rules or enactments promulgated by the legislative authority of the state" or upon "long established local customs having the force of laws."

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DEFENDANT'S

BRIEF

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 348.

THE NATIONAL MUTUAL BUILDING AND LOAN ASSOCIATION OF NEW YORK,
Plaintiff in Error,
vs.
FRANK V. BRAHAN.

In Error to the Supreme Court of the State of Mississippi.

BRIEF FOR DEFENDANT IN ERROR.

Howard Mayer,
Of Counsel for Defendant in Error.

The Tucker Printing House, Jackson.

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Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 158.

THE NATIONAL MUTUAL BUILDING & LOAN ASSOCIATION, OF NEW YORK, PLAINTIFF IN ERROR,

VS.

FRANK V. BRAHAN, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF MISSISSIPPI.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This writ of error presents for review the final judgment of the Supreme Court of Mississippi (Record, page 103), which affirmed a judgment in favor of the Defendant in Error, Frank V. Brahan, against the plaintiff in Error, the National Mutual Building & Loan Association of New York.

Defendant in error brought his suit by attachment in the circuit, or common law court of Lauderdale County, Mississippi, against the plaintiff in error, for the pur-

pose of recovering interest alleged to be usurious which he had paid on two mortgage loans, one made in May, 1892, and the other made in August, 1894.

Such payments so made by him were recoverable according to the law of the State of Mississippi, being Section 2348 of the Code of 1892, which is as follows:

> "2348. LEGAL RATE—The legal rate of interest on all notes, accounts and contracts shall be six per centum per annum; but contracts may be made in writing for the payment of a rate of interest as great as ten per centum per annum. And if a greater rate of interest than ten per centum shall be stipulated for, or received in any case, all interest shall be forfeited, and may be recovered back, whether the contract be executed or executory; but this section shall not apply to a building and loan association domiciled in this State, dealing only with its members."

The claim of defendant in error was, and is, that the plaintiff in error had exacted from him interest in excess of ten per centum per annum, disguising and concealing a part of the same under the name of premiums; that the so-called premiums exacted were not bona fide premiums but were of such nature as to be in fact no other than interest.

This suit was brought after, and in pursuance of the decision of the Supreme Court of Mississippi in the case of *Sokoloski v. New South Building & Loan Association*, 77 Miss., 155, which was decided at the March term, 1899.

In order that the case may be more easily understood, it will be well to state here the legislative and judicial history in Mississippi of this question.

Since the year 1822 the Statutes of Mississippi have prohibited the contracting for more than ten per cent. per annum interest. (Hutchinson's Mississippi Code, p. 641; Code of 1857, p , 370; Code of 1871, Sec. 2279; Code of 1880, Sec. 1141; Code 1892, Sec. 2348).

Since the year 1847 it has been the settled law in Mississippi by judicial declaration of the effect of those stat-

utes, that even after usurious interest has been paid the excess over six per cent. could be recovered by action at law. (*Bond v. Jones*, 8 S. and M. 368; *Dickerson v. Thomas*, 67 Miss., 777.

Section 1042 of the Code of 1880, being also Section 849 of the Code of 1892, is as follows:

> "1042. Corporations which exist by the laws of any other state of the Union, may sue in this State by their corporate names, and they shall also be liable to be sued or proceeded against, by attachment or otherwise, as individual non-resident debtors may be sued or proceeded against. And the acts of the agents of any such foreign corporation, shall have the same force and validity, as the acts of agents of private persons, within the scope of their authority; but such foreign corporations shall not, by their agents or otherwise, do or commit any act in this state contrary to the laws or policy thereof, and shall not be allowed to recover, on any contract made in this State, or on any cause of action originating therein, which is in violation of law or public policy."

Chapter XIII, of the Mississippi Session Laws of 1886 (See Laws, p. 35), is as follows:

> SECTION 1. *Be it enacted by the Legislature of the State of Mississippi*, That hereafter no person, bank, corporation or association of persons except Building and Loan Associations, shall demand or stipulate for a greater rate of interest than ten per cent. per annum, for any money advanced or loaned, or any note, account, or other evidence of debt.
>
> "SEC. 2. *Be it further enacted*, That every provision of any Act heretofore passed, creating any corporation or amending any Act creating any corporation, which authorizes any such corporation to take or receive more than ten per centum interest per annum, or which is in conflict with Section 1141, of the Code of 1880, is hereby repealed."

It was decided in *Building & Loan Association v. Pinkston*, 79 Miss., p. 468, that this statute was not amendatory of the previously existing interest laws, but was a repealing act; and that the exception in Section 1 by which build-

ing and loan associations were allowed to take more than ten per cent. applied only to those associations which had *previously* been incorporated *by this State*, and did not authorize foreign associations, "deriving all their powers and privileges from the laws of other states, as interpretated by the courts of such states," to make such exorbitant contracts in this State.

That construction of this statute is conclusive here:

Tullis v. Railroad Co., 175 U. S., 348.

Cargill v. Railroad Co., 180 U. S., 452.

Under such state of the law the plaintiff in error having been incorporated in New York in 1888(Record, pp. 8, 9), established an agency in the City of Meridian, Miss., some time before May 1892, (Record pp 7, 9). The exact nature of this agency, and the extent of the agent's power, were amongst the controverted questions in the instant case, and were decided adversely to plaintiff in error on the evidence.

At the March Term, 1899, the Supreme Court of Mississippi decided the *Sokoloski* case mentioned above (77 Miss., 155), and *held:* That a true "premium" in a building and loan contract was "one gross sum" (deducted or paid), "in consequence of open bidding for the advancement;" that the exaction by private and non-competitive contract of a fixed six per cent. as interest, and a second fixed six per cent. as so-called premium, was only a cover for an usurious twelve per cent., and was "opposed to our public policy, and usurious and void," meaning that the entire contract for interest was void; that while the Mississippi Statutes allowed a domestic association, chartered in that state, to exceed the legal rate of interest, such privilege was not accorded to a foreign association, and comity did not require that it should be, since the matter is one of the State's own public policy.

This case was the first in Mississippi in which those questions had been raised and decided. It was quickly, however, followed by several others: *Crofton v. B. & L. Association*, 77 Miss., 166, decided the same day; *Association*

v. Tony, 78 Miss., 916, decided at the March term, 1901; *Association v. Shannon*, 78 Miss., 955, same term; *Association v. Wilson*, 78 Miss., 995, same term; *Association v. Pinkston*, 79 Miss., 468, at October term, 1901; *Association v. Farnham*, 81 Miss.. 364, at October term, 1902.

In the *Shannon* and *Wilson* cases it was decided that where a foreign association carries on its business in Mississippi through local agents or through local boards, and the notes are made in that state, secured by mortgages on lands of the borrower located in that state, and the borrower, a resident of that state, has through a series of years made all payments to an agent or a board established in this State, it was a localization by the association of its business in Mississippi; and where the real intention of the parties as disclosed by what they actually did, was so to localize the business there, the contract was subject to the usury laws of Mississippi, although the writing contains a provision for payment in another state having dissimilar laws.

Defendant in error brought this suit to recover the usurious interest paid by him, in July, 1899, after the decision of the *Sokoloski* and the *Crofton* cases.

In defense, the plaintiff in error availed itself of the practice act of Mississippi, being Section 886 of the Mississippi Code of 1892, which is as follows:

> "686. Notice of special matter under the general issue: If the defendant desire to prove under the general issue in any action any affirmative matter in avoidance, which by law may be proved under such plea, he shall give notice thereof in writing, annexed to, or filed with the plea; otherwise such matter shall not be allowed to be proved at the trial; and the defendant may in all cases, plead the general issue and give written notice therewith of any special matter which he intends to give in evidence in bar of the action, and which he would be otherwise obliged to plead specially; and when such notice shall be given by the defendant, the plaintiff shall, before the trial of the cause file a written notice to the defendant of any special matter which he intends

to give in evidence in denial or avoidance of such special matter so given notice of by the defendant, and which it would have been necessary to reply specially had the defendant's defense been specially pleaded; and if notice be not given as required, evidence of such matters shall not be admissible on the trial."

In *Tittle v. Bond*, 53 Miss., 578, it had been decided that this statute narrowed the scope and effect of the general issue, that every defense not merely consisting of a denial of the allegations of the declaration, must be pleaded specially or notice thereof must be given under the general issue.

So conducting its defensive pleading, the plaintiff in error filed its general issue and appended thereto a most elaborate and lengthy notice of the affirmative matters on which it intended to rely. (See Record, pages 7 to 14).

The attention of this court is called to the fact that in such notice the plaintiff in error undertook to prove amongst other things, (1) that the contract between it and the defendant in error was a New York contract; and (2) that by the laws of New York it was a valid and enforcible contract; and, also, (3) that its contracts were not put into the form which they bore in order to evade the usury laws of Mississippi.

The issues were made up on September 27th, 1899. Afterwards, without having first obtained leave of the court, plaintiff in error filed on April 20th, 1901, being some eighteen months after the cause was at issue, an amended notice, being a wholly different notice, under its plea of general issue; and, later, on August 6th, 1901, again without having obtained leave to do so, it filed an amendment to its plea, and an amended notice, wholly different from the first notice, being nearly two years after the cause had been put at issue and ready for trial. (See Record, pp. 14 to 17.)

At the following term of the court, the defendant in error moved to strike out those amendments because filed too late, and without leave of the court.

Plaintiff in error made a counter motion for permission to file the notice, appearently *ore tenus*. The court refused leave to file, and struck out the notice already filed without leave (Record p. 18.)

Thereupon the case was tried on voluminous evidence before a jury, and the result was that the jury, after hearing the evidence, returned a verdict in favor of the defendant in error for the amount paid by him in excess of the principal loan made in June, 1894, with interest aggregating $771.75. (Record p. 98.)

The failure of the jury to find in favor of the defendant in error for the usurious interest paid on the loan of 1892 arose from the fact that the trial court instructed the jury that the contract of May, 1892, was not usurious, and that plaintiff was not entitled to recover the interest paid thereon. (Record, p. 94.)

After the usual motion for a new trial, the plaintiff in error prayed an appeal to the Supreme Court of Mississippi from the judgment against it for $771.74 aforesaid. (Record pp. 98 and 99.)

On the 7th day of April, 1902, the judgment of the trial court was affirmed (Record pp. 103 and 104), and from such judgment of affirmance, this writ of error was prayed.

The opinion of the court is found in the record, pages 104 to 116. The case itself is reported in 80 Miss., p. 407.

The first, second, third, fourth and sixth assignments of error present a claim that the judgment complained of violated the first Section of the Fourteenth Amendment by depriving the plaintiff in error and its shareholders of their property without due process of law.

The claim is put in several ways: (1), That the judgment deprived a New York corporation of its liberty to contract and of its property; (2) that it deprived a New York corporation of its liberty to make a contract in the State of New York with its shareholder residing in Mississippi, said contract being valid under the laws of New York and performable in that State; (3) that it deprived a New York corporation of its liberty to advance money to

its shareholder residing in Mississippi and of its liberty to contract with its shareholder in New York to repay said money in New York; (4) that it deprived a New York corporation of its money and property advanced to one of its shareholders and due appellant under a contract performable in New York and valid and enforceable under the laws of that State; and (5) that it deprived appellant's shareholder of his liberty to make a contract performable in New York, to the injury of appellant.

The fifth assignment of error affirms that the judgment complained of denies to the appellant the equal protection of the laws.

The seventh assignment affirms that by the rendition of the judgment complained of, full faith and credit were not given to the public acts, records and judicial proceedings of New York, under which plaintiff had been incorporated, and by which its contracts had been upheld.

The eighth and ninth assignments of error affirm that by the rendition of the judgment complained of the declaration of public policy first announced in the Sokoloski case is applied to a contract long previously made; which is tantamount to judicial legislation, and is in effect, the passage of a law *ex post facto*, and also impairs the obligation of the contract of plaintiff in error.

Brief in Behalf of Defendant in Error.

The assignments of error in this case fall legally into two classes: First, those assignments which invoke the protection of the Fourteenth Amendment, and those which invoke Section 1 of Article IV of the Constitution of the United States; and, secondly, those which invoke Section 10 of Article 1.

The former class embraces assignments numbered one, two, three, four, five, six and seven; and they fall within the rule under Section 709 of the Revised Statutes which required them to be specially set up and claimed in the State Courts.

Chapin v. Fye, 179 U. S., 127.
Johnson v. New York Life, 187 U. S., 491.

The latter class embraces assignments numbered eight and nine, and they do not fall within the rule which requires them to be specially set up, but can be considered by this Court if they were necessarily involved in the litigation in the State court.

Railroad Company v. Adams, 180 U. S., 1.

So far as the former class of assignments is concerned, being all except the eighth and ninth, this Court cannot consider the Federal questions sought to be raised by this appeal, because they were not raised in time and in the proper way. What the Supreme Court of Mississippi did was nothing more than to decline to pass on the alleged Federal questions because those questions had not been raised in the trial court, as required by the state practice.

Of course it follows that the same reason applies to the action of the trial court. As shown in the statement, these Federal questions were sought to be raised in the trial court by a so-called amended notice filed eighteen months after the cause was at issue and ready for trial, which was afterwards stricken out for that reason only by the trial court. This was a mere question of state practice; and when the Supreme Court of the State refused to consider the Federal questions for that reason, as it did (Record pp. 115–116), and for that reason alone, its decision is not reviewable here.

Kipley v. Illinois, 170 U. S., 182.

Railroad Co. v. Purdy, 185 U. S., 148.

Laten v. Missouri, 187 U. S., 356.

Johnson v. New York, 187 U. S., 491.

SECOND POINT—The eigth and ninth assignments of error invoke Section 10, Article 1 of the Federal constitution, and also apparently the prohibition of Section 9, Article 1 against the passage of *ex post facto* laws.

Those sections have no application. The complaint here is not of the enforcement of any state statute enacted subsequently to the making of the contract. The judgment complained of was for the recovery of interest paid on a contract made in 1894, while the statute enforced was

a section of the Mississippi Code of 1892. Indeed the very language of the assignments is a complaint of the rendition of the judgment, and not of the enforcement of a subsequent statute. That these provisions apply to statutes only and not to judgments is settled law.

New Orleans, etc., Co. v. Louisiana, etc., Co., 125 U. S., 18.
Railroad Co. v. Plainview, 143 U. S., 371.
Bacon v. Texas, 163 U. S., 207.
Railroad Co. v. Adams, 180 U. S., 41.
New Orleans Co. v. Louisiana Co., 185 U. S., 336.

The same course of reasoning which determined that Section 10, Article 1 related only to statutes and not to adjudications, leads to the same conclusion as to the prohibition of the passage of *ex post facto* laws. There must be a retrospective statute. The judgment of the Court must apply to a transaction innocent when done a criminal or a penal statute subsequently enacted.

Kring v. Missouri, 107 U. S., 221.
Pierce v. Carskadon, 16 Wall, 234.
Burgess v. Salmon, 97 U. S., 385.
Dent v. West Va., 129 U. S., 114.

It would never do to hold that a statute is *ex post facto* or that a judgment of a court is "tantamount to an *ex post facto* law," because an act in fact violative of an existing law may have been erroneously supposed by the perpetrator to be lawful when and as he did it; for that would be to bring a statute or judgment to the test, not of the law as it is, but of the law as it was by each particular actor supposed to be.

THIRD POINT—In respect, now, to all of the assignments: This Court will not undertake to review the decision of the State Court, because so to do would be to review adjudications made on pure questions of fact.

By analyzing the pleading of the plaintiff in error in the Court below (Record pp 7-14), it will be seen that the controlling questions of fact on which the case was disposed of, were these: (1) an averment and an undertaking to prove that the plaintiff in error was a building and

loan association domiciled in New York which never had any branch office in the City of Meridian, and never had there any agent authorized to grant or make loans; (2) that the contract between the parties was a New York contract, performable and solvable in that state, and was not a Mississippi contract; (3) that the contract was not put in the shape in which it was put in order to evade the usury laws of the State of Mississippi.

The foregoing questions were all heard by the trial court on much evidence produced by both parties to the cause; and that Court decided adversely to plaintiff in error as to the contract of 1894 (on which this writ of error is based); and the Supreme Court affirmed that finding and the consequent judgment.

The foregoing were questions of fact, and they were duly adjudged adversely to the plaintiff in error both in the trial court and in the Supreme Court of the State. The Court determined judicially and regularly, in effect, that the plaintiff in error had located its business in Meridian notwithstanding the statements in its written contract, because

1. It had an agent there authorized to make loans, and he made the loan in question; and

2. The contract, as a fact, was not performable and solvable in New York, but was in Mississippi; and

3. It was put into its ostensible shape in order to evade the usury laws of Mississippi.

In brief, the decision was that the contract was in fact a Mississippi contract disguised as a New York contract in order to evade the usury laws of Mississippi and defeat its public policy.

The underlying questions mooted and decided were, not whether the plaintiff in error had a contract, but the fact whether the locus of that contract was in Mississippi or New York; not whether a New York corporation and its Mississippi stockholders had a right to contract in New York, but whether they had not in fact contracted in Mississippi.

It is settled law in this court that it will not undertake to review the decision of a state court on a bare question of fact, even although had that question been determined differently to what it was, and the judgment of the state court had then gone against the plaintiff in error, he would then have been entitled to his writ here.

Dower v. Richards, 151 U. S., 658
Egan v. Hart, 165 U. S., 188.
Railroad Co. v. Chicago, 166 U. S. 226.
Hendrick v. Railroad Co., 167 U. S., 673.
Turner v. State, 168 U. S., 90.
Gardner v. Banestell, 180 U. S., 362.
Western Union v. McCall Pub. Co., 181 U. S. 92.
Bement v. Harrow Co., 186 U. S., 70.

Nor will this court review the decision of a state court upon the ground that the finding was against the evidence or the weight of the evidence.

Thayer v. Spratt, 189 U. S., 346.

There was still another controlling question of fact which was put in issue in the court below and determined adversely to plaintiff in error, and that was an issue as to what was the law of the State of New York (Record p. 9). In the trial of a case in Mississippi, a question of that sort remains, and is, a question of fact, and however it may be determined in the state court, whether correctly or wrongly, this court will not review it for that reason.

Building & Loan Association v. Ebaugh, 185 U. S. 114.

This rule is not changed by the fact that there is a Mississippi Statute, being Section 939 of the Code of 1892, which provides that "When any question shall arise as to the law of the United States or of any other state or territory of the United States or of the District of Columbia, or of any foreign country, the court shall take notice of such law in the same manner as if the question arose under the law of this state."

This provision does not change the essential nature of the question; it still remains a question of fact. The effect

of the provision is only to dispense with the necessity of taking depositions to prove the law, or producing certified copies of the statutes. It is a mere provision of evidence. In respect to that matter, it requires the Mississippi courts to take judicial knowledge of the fact under consideration exactly as under the general rules of evidence all courts are required to take judicial knowledge of many facts commonly known or of *quasi* public nature.

However, this point is merely cumulative; and if this court should hold that the effect of section 939 is to exclude the rule expounded in the *Ebaugh* case, there still remains the insuperable difficulty to plaintiff in error that three leading propositions of fact mentioned above, all of which were adversely determined to it, are beyond the power of this court to review; and those determinations of fact go to the very root of its claim to the benefit of a New York contract. All of the assignments of error postulate the existence of a New York contract; but in fact there was none.

The case of *Algeyer v. Louisiana,* 165 U. S., 578 does not in any wise conflict with the foregoing argument. The Insurance Company in that case had not appointed any agent in Louisiana and had not complied with the law regulating the doing of business by foreign corporations; and Mr. Justice Peckham, in the opinion, repeatedly and plainly insists on the fact that the contract was actually made in New York (which fact was expressly admitted in the brief of counsel). The decision was plainly put on the ground that what was done in Louisiana was no more than to mail a notice, which was due to be given under a *pre-existing contract* "which it is conceded was made outside and beyond the limits of the jurisdiction of the State of Louisiana." In the instant case, the very question put in issue by plaintiff in error itself, and judicially determined against it by due and regular trial in a court of competent jurisdiction, was whether the contract was in fact made in New York or in Mississippi.

The instant case falls within the principle of *Hooper v. California,* 155 U. S., which was expressly reaffirmed in the *Algeyer* case.

See, also, *Noble v. Mitchell,* 164 U. S., 370; *Oil Co. v. Texas,* 177, U. S., 46.

Further; the *Algeyer* case, while holding that the right to contract was "property" within the protection of the Fourteenth Amendment, very carefully restricted that holding to the right to make "proper" contracts. That modifying word was carefully applied. It was not intended to hold and did not hold, that the Fourteenth Amendment was intended to secure a right to make any and all sorts of contracts—amongst others contracts for usury. That matter is within the limitations which a state may lawfully impose on the right of the citizen to make contracts.

Holden v. Hardy, 169 U. S. 366.
United States v. Joint Traffic Assn., 171 U. S. 505.
Addystone Co. v. United States, 175 U. S. 211.

FOURTH POINT—Moreover, so far as the assignments of error seek to set up the rights of stockholders, independent of the right of the Association itself, that grievance, if any, is not for plaintiff in error to assert; the corporation, not having the rights of its personal members, cannot invoke the guaranties of the Federal Constitution personal to them. As for itself, and as to its own rights, being a corporation foreign to the State of Mississippi, it has no absolute right of recognition, and the State may impose on it such terms as it may think proper. *Waters-Pierce Oil Co. v. Texas,* 177 U. S. 28. Surely such a corporation cannot justly complain that it is not allowed the privilege of making contracts in Mississippi which the individual citizens of the state are forbidden to make, or not allowed to project into Mississippi its own business against the public policy of the state and subject the lands and homes of those Mississippi people who may be tempted by present needs to make improvident or misunderstood con-

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tracts to the burdens and frequent forfeitures of usurious debts. The prohibition is a legitimate exercise of the police power.

FIFTH POINT—Especially will this court not undertake to review a decision ot a State Supreme Court which holds a contract void as contrary to public policy. It is immaterial that such public policy is declared in a statute, if the statute antedates the contract.

Parker v. Moore, 115 Fed. Rep. 799.
Farrer v. Keach, 15 Wall, 67.
Rockhold v. Rockhold, 92 U. S., 130.
New York Life v. Hendren, 92 U. S., 287.
Bank v. McVeigh, 98 U. S., 333.
Dugger v. Bocock, 104 U. S., 601.
Sam Francis v. Scott, 111 U. S., 769.
Railroad Co. v. Ferry Co., 119 U. S. 624.
New Orleans Co. v. Louisiana Co., 125 U. S., 34.

SIXTH POINT—We respectfully submit that for the reasons given above the question whether the decision of the State Supreme Court is right or wrong is not brought into view; but out of abundant caution we shall submit a very brief argument, or rather memorandum, on that head.

The decision appealed from is in itself correct. It so happens that the mooted questions here have been persistently and repeatedly presented to the State Supreme Court; and that court either perforce or through deference to counsel has so often and so fully considered them and has so fully and argumentatively stated its position that nothing is left to be said—at least nothing occurs to us to say further. The opinions to be found below seem to exhaust the argument.

It may serve a useful purpose, as introductory, to remind this court that the Association established its agency in the State (whatever the nature of it) with all of the statutes cited in the Statement of the Case heretofore made in force, and made the contract in question in 1894.

The cases to be consulted are, in the order as given here:

1.—*Sokoloski v. Association*, 77 Miss., 155.
2.—*Crofton v. Association*, 77 Miss., 166.
3.—*Association v. Shannon*, 78 Miss., 955.
4.—*Association v. Wilson*, 78 Miss., 993.
5.—*Association v. Tony*, 78 Miss., 916.
6.—*Association v. Pinkston*, 79 Miss., 468.
7.—*Association v. Brahan*, 80 Miss., 407.
8.—*Association v. Shannon*, 80 Miss., 643.
9.—*Association v. Farnham*, 81 Miss , 365.

Judge Whitfield in his opinion (Record, p. 107, 108) very carefully analyzes the case of *Bedford v. Eastern B. & L. Assn.*, 181 U. S., 237, and shows that it is in perfect harmony with the ruling of the Mississippi Court. In *Blackstone v. Miller*, 188 U. S., 189, this court declared that nothing but the fact that the law of the place where the debtor is, will make him pay, gives a debt validity. This case goes far to destroy the obsolescent notion of legal fictions in cases where those fictions are opposed to the actual facts; and its essential principle is a strong support for the instant case.

We supplement the citations in the Mississippi cases, by referring to the other late cases of

Association v. Parish (*Neb.*), 96 N. W. Rep., 243.
Skinner v. Association (*Fla.*), 35 So. Rep. 67.

Respectfully submitted,

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